

INTHE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 139/02

In the matter between:

KENNETH MAVUSO AND 3 OTHERS APPLICANTS

And

CASHBUILD (SWAZILAND) (PTY) LIMITED RESPONDENT

CORAM:

NKOSINATHINKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANTS: M. MKHWANAZI

FOR RESPONDENT: J. HLOPHE

JUDGEMENT 16.07.07

[1] This is an application for determination of unresolved dispute brought by the

applicants against the respondent.

[2] The applicants are former employees of the respondent. They were all dismissed by the respondent on the 5th February 2002 after the chairman of a disciplinary enquiry found them guilty of violating the staff purchase policy in that they purchased goods for other people using the staff discount facility.

[3] One of the applicants, Kenneth Mavuso was also facing a second charge of violating the staff purchase policy in that he purchased goods using the staff discount facility and exceeded the limit of E30 000:00 in a three-year cycle. He was found guilty on that charged as well.

[4] The applicants claim that their dismissal was wrongful and unfair both procedurally and substantively.

[5] The respondent averred in its replying papers that the applicants were dismissed after a full and fairly conducted disciplinary hearing and they were found guilty of dishonesty which is a dismissible offence in terms of Section 36 (b) of the Employment Act, and that taking into account all the circumstances of the case it was fair and reasonable to dismiss them.

[6] The minutes of the disciplinary enquiry handed to court and marked "R8" were incomplete. "R8" is a handwritten record of the proceedings relating to only one of the applicants, Kenneth Mavuso, whose name is reflected as Kenny V. Mavuso. On this document a charge sheet is supposed to be annexed as annexure "A" but there is no such annexure.

[7] The court therefore did not have the benefit of seeing how the charges were actually framed against each of the applicants. It is only in relation to Kenneth Mavuso that the court was able to see how the charges against him were actually drafted. The charges appear on the document marked "A1" which is a notice to attend an inquiry.

[8] The nature of the charges can be gleaned from paragraph 10 of the applicants' application, which appears as follows:

"10. On the 5th February 2002, the respondent terminated the services of the applicants on the grounds that they purchased goods for other people and not for themselves on the staff purchase facility. "

[9] The policy contains the following in paragraph 3: "**5. Use of facilities.**

3.1. No employee may use the staff discount facility for the purchase of any goods other than goods intended for use at the employees place of residence or on property registered in the name of the employee.

3.2. No employee may use the staff discount facilities to purchase any goods for the purpose of re-sale or to present as a gift to any individual or institution. "

[10] The chairman's findings were presented to court as annexures R2, R4, R6, and R7. From these documents it appears that Robert Mgcina and Emmanuel Dlamini pleaded guilty, Kenneth Mavuso and Sipho Dlamini pleaded not guilty.

[11] The evidence led before the court revealed that AW1, Kenneth Mavuso was first employed by the respondent in September 1988 and was based at the Matsapha Branch. He did not deny that he bought the building material through the staff purchase facility. He said he was building a house on a piece of land that was given to him by his father-in-law at Ngwane Park. He said he got a go ahead from the Manager to purchase the goods.

[12] He said he did not know about the existence of the staff purchase policy. He said he first learnt about it at the hearing. He said during the hearing he was denied the opportunity to call the Manager as his witness. He said the Manager was also disciplined but was not dismissed and only got a written warning.

[13] AW1 said if it was wrong for him to purchase the goods, the Manager should have stopped the sale. He said he did ask for permission to exceed the limit. AW1 further told the court that the chairperson came in the same car with the initiator, Mr. Haffejee and also booked in the same hotel. That piece of evidence was not denied by the respondent.

[14] AW2 Emmanuel Dlamini gave a similar version of the events that led to their dismissal as AW1. He said he was employed by the Matsapha Branch of the respondent on the 5th April 1991. He admitted that he bought the building material for his brother. He also said he was not aware that he was not supposed to buy for third parties using the staff purchase facility.

[15] AW3, Robert Mgcina told the court that he was employed by the respondent on the 3rd June 1991 as a salesman. He said he was charged for buying goods for his father. He said he pleaded guilty to the charge. He said they were refused the opportunity to call witnesses. He also said that he was not aware of the policy.

[16] AW4, Siphon Dlamini said he was employed by the respondent in 1996 as a Sales Assistant. He said he used the building material to build a house at his mother's plot. He also told the court that he was not aware of the policy document marked "R1" prohibiting the purchase of goods on behalf of third parties.

[17] On behalf of the respondent two witnesses testified. RW1, Reginald Mdluli told the court that during 2002 he was a Branch Manager based at Matsapha. He said the applicants were dismissed because they violated the staff purchase policy in that they bought goods for third parties using the staff discount facility.

[18] He said that whenever a new policy was introduced, a meeting would be held with the staff members to make them aware of it. He said such briefing meetings were held on Wednesdays. He said he did read this policy in question to the employees including the applicants.

[19] He said the workers that are present during these meetings then signed a form as evidence that they have been made aware of the policy. He said if new employees are recruited, the policy document is also read to them and they would also be required to sign. He said that explained why some of the employees who were not yet there in 1998, have their signatories also appearing

on the same form.

RW2, Ishmael Haffejee told the court that during 2002 he was an employee of the respondent. He was a Loss Prevention Manager. He left the respondent in 2005.

RW2 said whilst going through some loss reports, he realized that in Matsapha there were extremely high sales for staff purchases. He then came to Matsapha and began to investigate. He said he found that there was a breach of the staff purchase policy. He said he spoke to each of the applicants and they admitted that they were aware of the policy. He said Emmanuel Dlamini admitted that he bought the goods for his brother.

RW2 told the court that Kenneth Mavuso told him that he was building a double storey house. They went to inspect the house only to find that the house that he led them to was an old house. He said Mavuso admitted that he bought tiles for his father-in-law who did not live in that house. RW2 said that conduct was in violation of the company policy.

The other applicants also led RW2 to various places where they said they used the goods. On arrival at these sites the applicants could not account for the goods. In the cases where some of the purchased goods were found, they represented only a very small portion of building materials that they had bought using the staff purchase facility.

RW2 then preferred charges against the applicants for breach of company policy. He said the applicants were represented by a certain Bernard Mathole who was from South Africa. He said RW1 did give evidence in three of the hearings. He said it was not true that the applicants wanted to call RW1 as their witness but were not allowed.

RW2 said the applicants were asked at the inception of the hearing if they had any witness to call. He also said at the hearing the issue of the purchase policy was never raised.

During cross-examination RW2 said the Branch Manager was required to

monitor the use of staff purchase policy. He said the Branch Manager was also disciplined. During reexamination he told the court that the applicants did not object to Bernard Mathole appearing on their behalf.

ANALYSIS OF THE EVIDENCE:-

The applicants told the court they never asked Bernard Mathole to represent them during the disciplinary hearing. Sipho Dlamini told the court that he pleaded not guilty to the charge, but was advised by Bernard Mathole to change his plea to that of guilty.

The evidence revealed that Mathole usually represented Cash Build employees in disciplinary hearings in South Africa. Mathole had no right however to impose himself on the applicants. This was in violation of the respondent's own disciplinary code and procedure, which provides under article 4.1 (ii) that the accused has a right to "have representation by a fellow employee only, if requested."

[29] It was irregular therefore for the respondent to impose a representative who was not even fellow employee. All the applicants told the court that they never asked Mathole to represent them.

[30] There was also evidence that the chairperson and the initiator, RW2, came in the same motor vehicle and also booked in the same hotel. That evidence was not denied by the respondent. The applicants therefore had a genuine reason to feel that the hearing was not being conducted in an impartial manner.

[31] The evidence revealed that Kenneth Mavuso was facing two charges. The second charge was that he made purchases exceeding the **E30,000:00** limit. The duty to monitor the staff purchases was on the Branch Manager. The Manager having allowed or failed to stop the purchases that exceeded the limit was also

guilty of violating the policy. The Manager was indeed disciplined. He was not however dismissed, as was the case with Kenneth Mavuso. He was only given a written warning.

[33] It was therefore unfair on Kenneth Mavuso to be dismissed by the respondent and only to give the Manager a written warning when the two were equally guilty of violating the company policy.

(See; National Union of Mineworkers of SA v Haggie Rand LTD (1991) 12 ILJ 1022 (LAC))

[34] The applicants' main defence in this case was that they were not aware of the respondent's policy prohibiting the use of the staff discount facility to purchase goods on behalf of third parties. The Branch Manager who introduced the policy to the workers at the respondent's place testified in court and appeared as RWI.

[35] RW1 told the court that whenever a new policy document came out, it was introduced to the workers during staff meetings that were held on Wednesdays in the morning. He said this policy was an amendment to another policy that was in use. He said after the briefing, the workers would sign a form to show that the new policy had been read to them. He said the applicants, together with other workers indeed signed the form, which was marked "A3."

[36] The applicants did not deny that it was their signatures that appear on the form. They argued that that may have been signing the form for a different policy other than the staff purchases policy.

[37] The evidence that new company policies were introduced during the Wednesday meetings was not disputed by the applicants. They also did not dispute the evidence by RWI that the staff purchase policy that was introduced in August 1998 was an amendment to another policy that was in operation.

[38] RWI's evidence before the court was flowing and was given forthrightly.

The court finds that he was a reliable and trustworthy witness and the court has no reason not to accept his version. When taking into account all the evidence before the court therefore, the court comes to the conclusion that it is more probably that the applicants knew about the policy than that they did not. This conclusion is also supported by the respondent's undisputed evidence that it was the company's practice that all new policies were introduced to the staff during the Wednesday morning meetings. There was no suggestion, nor was there any evidence that there were policies that were introduced at the respondent's workplace in other ways other than through the Wednesday morning meetings, and that the staff purchases policy may have been one of those.

[39] The dismissal of the applicants was however procedurally unfair in that they were not represented by a fellow employee during their disciplinary hearing as envisaged by the respondent's disciplinary code.

[40] Further, the sanction of dismissal on Kenneth Mavuso on the second charge that he was facing of exceeding the staff purchase limit was unfair because the Manager who was also disciplined for violating the policy was not dismissed but was given a written warning.

RELIEF:

[41] The applicants were dismissed in 2002. The court was informed that their positions have since been filled. From the evidence presented in court it became clear that the trust between the parties has been eroded. The court will not therefore make an order for re-instatement.

[42] All the applicants are currently employed. Some are self employed and some are temporarily employed.

[43] This matter was postponed several times. On perusal of the record however, when it was postponed at the instance of the respondent, costs were tendered. The court will not therefore make an order for costs.

[44] Taking into account all the personal circumstances of the applicants the

court will make an order that the respondent pays the applicant the following amounts:-

a) KENNETH MAVUSO:-

i) Notice pay	E 2,610.00
ii) Additional Notice	E 5,712.00
iii) Severance Allowance	E14,280.00
iv) Compensation (E2,610.00 x 5 months)	<u>E13,050.00</u>
TOTAL	<u>E35,652.00</u>

b) EMMANUEL DLAMINI:-

i) Notice pay	E 2,610.00
ii) Additional Notice	E 4,716.00
iii) Severance Allowance	E11,790.00
iv) Compensation (E2,610.00 x 5 months)	<u>E13,050.00</u>
TOTAL	<u>E32,166.00</u>

c) ROBERT MGCINA:-

i) Notice pay	E 2,500.00
ii) Additional Notice	E 4,104.00
iii) Severance Allowance	E10,260.00
iv) Compensation (E2,610.00 x 5 months)	<u>E12,500.00</u>
TOTAL	<u>E29,364.00</u>

d) SIPHODLAMINI:-

i) Notice pay	E 1,775.00
ii) Additional Notice	E 4,050.00
iii) Severance Allowance	E 1,620.00
iv) Compensation (E1,775.00 x 5 months)	<u>E 8,875.00</u>
TOTAL	<u>E16,320.00</u>

The members agree.

**NKOSINATHI NKONYANE JUDGE -
INDUSTRIAL COURT**

His evidence that he was not paid his terminal benefits was not challenged.

[30] Taking into account all the foregoing observations the court will make an order that the respondent pays to the applicant the following amounts;

a) Notice pay	E810:00
b) Additional Notice	E2,664:00
c) Severance allowance	E6,660:00
d) Compensation	<u>E8,100:00</u>
TOTAL	<u>E18,234:00</u>

[31] The respondent is to pay the costs of suit.

The members agree.

NKOSINATHI NKONYANE

JUDGE OF THE INDUSTRIAL COURT