

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 236/04

In the matter between:

ZWELI SIMELANE

APPLICANT

And

SWAZI OXYGEN (PTY) LTD

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

ANDREAS NKAMBULE: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: L.M. SIMELANE

FOR RESPONDENT: S.M. SIMELANE

J U D G E M E N T - 03.06.08

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

brought by the applicant against the respondent.

[2] The applicant claims that he was substantively and procedurally unfairly dismissed by the respondent because of the following reasons:-

2.1. "The applicant was dismissed for having allegedly committed a dishonest act. It is alleged that he stole or was found to be in unlawful possession of company property.

2.2. There was no evidence to support the allegation that he had committed a dishonest act.

2.3. The applicant was never given a hearing by the respondent before his dismissal. He was not called to a disciplinary hearing to answer the allegations that were made against him."

[3] The applicant wants the court to make an order that he be paid his terminal benefits and also compensation for the alleged unfair dismissal, amounting to twelve months' salary.

[4] The respondent is opposed to the application. The respondent's defence is that the applicant was never unfairly dismissed but he resigned after he was caught committing a crime at work.

[5] The evidence led before the court showed that the applicant was first employed by the respondent on contract basis in April 1999 and became a full time employee in March 2003. He was employed as a cylinder handler and filler. The applicant denied that he was first employed on contract basis and that he only became a full time employee in March 2003. There was documentary evidence however that showed that he was indeed employed for a fixed period presented to the court as exhibit "2". It was not in dispute that the applicant remained in the continuous employment of the respondent until 26.02.2004.

[6] The applicant told the court that whilst he was on duty on 26.02.2004, on a Thursday evening at about 8:00 p.m. the respondent branch manager Andre Botha showed up and told him to stop working and go home. He said when Andre Botha, RW1, came he asked him why he (the applicant) was filling up cylinders that did not belong to the respondent. The applicant said RW1 shouted at him and insulted him. The applicant also said "RW1 threatened to shoot him with a gun that he had then produced. The applicant said he was paid his salary for February. He said he was never called to a disciplinary hearing though he appealed against the dismissal a month later.

[7] The applicant when shown the letter of resignation, he disputed it

and denied that he wrote it.

[8] RW1, Andre Botha told the court that on 26.02.2004 he was at home when he received a telephone call from an unknown person who reported to him that someone was committing a crime at the workplace. RW1 then left his home and went to Matsapha. He went via Fidelity Springbok Security Company which provided security services to the respondent and asked two security guards to accompany him to the premises as was not sure what he was going to find there. On arrival he found the applicant filling handigas cylinders that did not belong to the respondent but to their competitor, Total. RW1 told the applicant to stop what he was doing and asked the two guards to escort him out of the premises and told him to come on the following day for investigation. RW1 also said he told the applicant to consider what he had done over the weekend and to come to work on Monday for a disciplinary hearing.

[9] On Monday when the applicant came, he submitted a resignation letter. RW1 said the resignation letter was handed to him by the applicant and he accepted the resignation by the applicant. RW1 said no disciplinary hearing was held because the applicant resigned.

[10] Only two witnesses testified before the court, that is, the applicant and RW1. The applicant denied that he resigned. He denied that the

resignation letter was written by him. He denied that it was his postal address that appeared on the resignation letter marked exhibit "A". RW1 said this letter was given to him by the applicant at work on Monday.

[11] The court will accept the evidence of RW1 that the applicant resigned and that he personally gave him the letter of resignation. RW1 said the applicant was a good and reliable employee and he was surprised by what he found him doing on that night. RW1 said he advised the applicant to talk with his wife and consider what he had done during the weekend and that he would face a disciplinary hearing for what he had done. It appears that the applicant indeed seriously thought about the matter over the weekend and decided that he should resign rather than face a disciplinary hearing in which he might be found guilty and dismissed hence he submitted the letter of resignation on Monday.

[12] During cross examination of RW1, he was not shaken. His demeanour in court was that of an honest witness who had no reason to lie against the applicant. His version of the events was coherent.

[13] The court also finds that it was highly unlikely that a company of the respondent's status could forget or fail to hold a disciplinary hearing before the dismissal of one of its employees. The court

therefore accepts the respondent's version that no disciplinary hearing was held because the applicant had resigned. Resignation brings the contract to an end from the moment it is accepted by the employer. **(See John Grogan "Workplace Law" 8th edition at p.78).**

[14] The applicant denied that he wrote the resignation letter. RW1 however told the court that this letter was submitted to him by the applicant. As already pointed out in paragraph 12 herein, there was nothing that came out during cross examination of RW1 that could make the court not to believe his evidence that this letter of resignation was handed to him by the applicant.

[15] The court rejects the applicant's evidence that he was dismissed on the spot by RW1 and that RW1 scolded him, insulted him and also threatened to shoot him with a gun. There was no reason for RW1 to threaten to shoot the applicant with a gun as there was no evidence that the applicant tried to resist RW1's order that he should stop what he was doing and vacate the premises. Secondly, RW1's evidence that the company's regulations prohibited the carrying of a gun within the premises was not challenged. Thirdly, there were two security guards that RW1 had come with and there was a third security guard who was on duty on the premises, RW1 was therefore under no threat to necessitate him to use or threaten to use a gun against the applicant, who himself was also unarmed.

[16] The applicant was cross examined as follows about the gun:-

"Q. You said you were threatened with a gun.

A. Yes.

Q. What type of gun was it?

A. I did not clearly recognize it. I ran away when he went to his car.

Q. Did you actually see the gun?

A. Yes.

Q. So you can describe it.

A. I was running away. I just saw him pick up something.

Q. Was it a big gun or a small gun?

A. I think it was a small gun."

[17] The applicant also said RW1 insulted him. Again the court rejects this evidence by the applicant as false. The evidence which was undenied revealed that the applicant was caught in the act by RW1. There was no evidence that the applicant resisted the instruction to stop what he was doing by RW1. Three security guards were present at the scene. We find that it was highly unlikely that RW1 would have uttered these insulting words that the applicant told the court about in the presence of other people.

[18] In the final analysis the court finds that the applicant was an untrustworthy witness whose evidence cannot be relied upon. From the evidence presented before the court, the court finds as proved on a balance of probabilities that the applicant tendered his resignation, which was accepted by RW1, in order to avoid the disciplinary action against him.

[19] Taking into account all the evidence before the court and all the circumstances of the case, the court will make the following order;

- A) **THE APPLICATION IS DISMISSED.**
- B) **NO ORDER FOR COSTS IS MADE**

The members agree.

**NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT**