

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 443/05

In the matter between:

MESHACK TSABEDZE

APPLICANT

And

MASTER GARMENTS (PTY) LIMITED

RESPONDENT

CORAM:

NKOSINATHINKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. N. FAKUDZE

FOR RESPONDENT: MR. G. MASUKU

JUDGEMENT 26.06.08

[1] The applicant has applied to this court for determination of an unresolved dispute. He alleges in his papers that his employment was

unlawfully and unfairly terminated by the respondent. He is claiming payment of terminal benefits and also maximum compensation for unfair dismissal.

[2] The claim for terminal benefits was abandoned at the commencement of the trial as the court was informed that these were paid to the applicant. The only claim before the court therefore is that of maximum compensation.

[3] The respondent denies liability for the applicant's claim. The respondent avers that the applicant was fairly terminated in accordance with **Section 36 (a) of the Employment Act of 1980**.

[4] It is common cause that the applicant was an employee to whom **Section 35 of the Employment Act** applied. **Section 35(2) of the Employment Act** states that;

"No employer shall terminate the service of an employee unfairly "

The import of this is that the burden of proof shifted to the respondent to show on a balance of probabilities that the applicant was dismissed for an offence permitted by Section 36 of the Employment Act and further that it was fair and reasonable for the respondent to dismiss the applicant in the circumstances of the case. **(See Peterson Kunene v Swazi Wire Industries (Pty) Ltd. Case No. 195/2000 (IC).**

[5] The applicant in his evidence before the court stated that he was employed by the respondent on 4 August 2003 as a Personnel Manager. He was dismissed on 6 June 2005. On the day of his dismissal an employee was sent to call him to attend a meeting at 10:00 a.m. in the respondent's boardroom. He went there and found the Production Manager and the Human Resources Manager. He learnt in that meeting that the meeting was set to discuss matters pertaining to him. The Human Resources Manager, Mr. Brazil Caiphus Mfumo chaired the meeting.

[6] The applicant said that he went to the meeting thinking that they were going to discuss production issues as they have held several meetings before to discuss such issues. Mr. Mfumo however told the applicant that the purpose of the meeting was to discuss his poor performance. Mr. Mfumo told the applicant that management had decided that he should resign or be dismissed for poor performance. The applicant told the court that he was accused of not disciplining workers under his supervision. He said management accused him of acquitting employees that management wanted dismissed. The applicant said that the management wanted him to dismiss employees at all costs even if it was contrary to the company's disciplinary code and procedures.

[7] The applicant said the meeting adjourned and resumed at 3:00 p.m. At that time Mr. Mfumo came alone and served the applicant with a letter of dismissal. The applicant was given his terminal benefits. The applicant admitted that there was a letter that was written to him about poor work performance. He said the poor work performance complained about in that letter related to poor filing. The applicant said this problem was solved by dismissing the employee concerned and a new employee was recruited.

[8] The applicant denied that he received any other letter complaining about his poor work performance except the letter marked "RW1." He said he was seeing the other documents shown to him for the first time in court.

[9] RW1 Caiphus Brazil Mfumo testified on behalf of the respondent. He told the court that he is currently holding the position of Assistant General Manager, Administration. He said that at some times the respondent was not happy with the applicant's conduct and attitude towards his work. He said he issued two warning letters and held several counseling and appraisal meetings with the applicant. Mr. Mfumo said

at the meeting held on 6 June 2005 the applicant was told the reason why the meeting was being held. He said the applicant did not object to the meeting being held. He said that it was the applicant who offered to resign if the respondent did not appreciate his efforts.

[10] What became clear from the evidence was that no charge was preferred against the applicant for the alleged poor performance, and no disciplinary hearing was held before he was dismissed. Mr. Mfumo wanted the court to believe that the meeting held on 6 June 2005 somehow sufficed to serve the purposes of a disciplinary hearing. The court does not agree with that view and it is clearly wrong. An employee is entitled to expect that a disciplinary hearing would be conducted where he will be told of charges against him and where he will be given a chance to challenge the allegations against him.

[11] Even if the applicant was a poor performer, there was no evidence that he was subjected to a performance improvement plan and that he failed to improve.

[12] One of the letters written by the respondent complaining about poor work performance is dated 28 September 2004 and is marked "RW2". It was written by Mr. Mfumo to the applicant. In that letter Mr. Mfumo stated that "A final warning goes with this letter." The applicant having denied that he received this letter, the burden of proof shifted to the respondent to prove that the applicant did receive this letter. Even if it was not in question whether the applicant received this letter or not, the respondent still had the duty to hold a disciplinary hearing where the applicant would have the opportunity to defend himself and challenge the accusations of poor work performance levelled against him.

[13] The applicant told the court that the respondent wanted him to dismiss employees at random and not to follow the disciplinary code when dealing with their disciplinary issues. He said, for example that the

respondent's management wanted him to dismiss employees in instances where the code did not provide for that. The court does not think that it was wrong for the applicant to follow the provisions of the code to its letter.

[14] The minutes of the meeting of the 6 June 2005 show in the last paragraph that "Management would consult with the General Manager on the issue and provide feedback at 15:00 hours." Indeed at 15:00 p.m. Mr. Mfumo came with the letter of termination which was signed by the General Manager. This clearly goes against the suggestion that that meeting could as well be regarded as a form of disciplinary hearing. In a disciplinary hearing the decision is taken by the chairman. The General Manager in this case was not the chairman of the meeting and he was in fact not part of that meeting.

[15] It is clear that the dismissal of the applicant was substantively and procedurally unfair when it was carried out on 6 June 2005. Before the court however the respondent still had a chance to lead evidence to prove on a balance of probabilities that the applicant was fairly dismissed. (See **Central Bank of Swaziland v. Memory Matiwane. Case No. 110/1993 (I.C.A).**)

[16] Before the court the applicant admitted that he did receive a letter complaining about his poor performance. He said though he did not recall the contents of the letter, it could have been same as the letter marked "RW1". The complaints in "RW1" are stated as follows:-

"1. The personal files did not show there are three people working on them. Almost every file did not meet 100% efficiency rate.

-Some contracts were not signed; even exposing
the inefficiency of the office to inspectors.

-IR records totally disregarded; i.e. not entered into

personal files.

1. The above may be attributed to the number of employees in the office. I suggest that you cut the number down to two (2).
2. Always delegate job to them. Their performance level is very low. See if they do all that was covered in their job description.
3. Carry necessary corrective action if there are any dissatisfactory levels of performance or misconduct."

[17] The applicant told the court that the issue of poor filing was solved as the concerned employee was dismissed. The other issues mentioned in "RW1" concerned the conduct of employees under the supervision of the applicant. The applicant said that he dealt with these employees in terms of the provisions of the disciplinary code. The applicant said the management wanted him to dismiss those employees but did not do so as it would have been contrary to the code. We fail to see why the applicant was accused of being negligent if he was following the code in relation to each subordinate's case that he had to deal with.

[18] There was no evidence led to disprove what the applicant told the court, that is, that the way he handled the situation was in fact not as provided for in the code. In the circumstances, the respondent has failed to prove that the applicant was negligent and/or performing poorly in the discharge of his duties as Personnel Manager.

[19] Taking into account all the above observations, the court comes to the conclusion that the applicant's service was unfairly terminated both

substantively and procedurally.

[20] The applicant is forty six years old. He is married and has nine children. He was earning E3,100:00 per month. He was dismissed summarily without being charged and brought to a disciplinary hearing. To be dismissed in this manner, taking into account his position at the respondent's workplace was thoroughly embarrassing. The applicant was barely two years with the respondent. He was given all his terminal benefits. Taking all these factors into account the court will make an order that the respondent pays the applicant an equivalent of six months wages as compensation for the unfair dismissal amounting to (E3,100:00 x6) E1 8,600:00.

[21] The court accordingly makes the following order;

1. The respondent is to pay the applicant the sum of E18,600:00 as compensation for the unfair dismissal.

2. The respondent is to pay the costs.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT