

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 94/2000

In the matter between:

JOSEPH MYENI

APPLICANT

And

**JD GROUP SWAZILAND (PTY) LTD t/a
PRICE 'N PRIDE**

RESPONDENT

CORAM:

NKOSINATHINKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. S. KUBHEKA

FOR RESPONDENT: MR. Z. JELE

JUDGEMENT 17.11.08

[1] This is an application for determination of an unresolved dispute brought by the applicant against the respondent in terms of the provisions of the Industrial Relations Act of 2000 as amended.

[2] The applicant is the former employee of the respondent, a company involved in the furniture retail industry. The applicant was employed by the respondent as Store Manager on 01.09.97. He worked continuously until he was dismissed on 22.01.99 after he was found guilty of certain acts of misconduct and negligence.

[3] In his papers the applicant claims that his dismissal was both substantively and procedurally unfair in that the charges brought against him were unfounded, malicious and were not proved during the disciplinary hearing. He claims that the dismissal was

procedurally unfair because he was not given an opportunity to have access and to consult with his witnesses prior to the hearing due to the conditions attached to his suspension order.

[4] The respondent avers in its reply that the charges against the applicant were valid and were proven at the disciplinary hearing.

[5] The evidence led before the court revealed that at the time of his dismissal the applicant was stationed at the Manzini Branch of respondent having been transferred from Nhlangano. The applicant had a vast experience in the furniture industry. Before he joined the respondent, he had worked for two other furniture stores. During December 1998 certain charges were preferred against the applicant. After having been served with the charges, on 15.12.98 the applicant tendered a resignation letter on the following day 16.12.98. The applicant however attended the disciplinary hearing.

[6] At the disciplinary hearing the applicant was facing various charges involving gross negligence, dishonesty and failure to follow company procedures. The first charge that the applicant faced related to theft of a Hampton wall unit from the respondent's warehouse in Matsapha during the month of June 1998. The evidence led before the court showed that the applicant requested the person in charge at the warehouse, RW2, Samariah Vilakati to hand the warehouse keys to him on a certain Friday because he wanted to make a display during the weekend. RW2 obliged and handed the keys to the applicant. On Monday when RW2 opened the warehouse she found that one of eleven Hampton wall units that she had received on Thursday was missing. RW2 immediately reported to the applicant. The applicant however did not take any steps immediately. In particular, the applicant did not report to Head Office where the forensic investigator, Peter Warr was based.

[7] The applicant's defence was that he never physically received the keys but they were put on the desk of the Stock Controller who was temporarily out at the time that RW2 came to Manzini. RW2 however insisted that she gave the keys to the applicant.

[8] The evidence also revealed that there were other items that were stolen from the respondent's business. The items were recovered by the police, and some employees of

the respondent were arrested in connection with these items. The applicant caused the suspected employees to be released from police custody so that they could face disciplinary hearing. The employees were found guilty and were dismissed. The applicant said the employees were found guilty of being in possession of company goods without proof of purchase.

[9] The respondent presented exhibit "R2" being the policy document of the respondent. In terms of this policy all incidents of theft should be reported to the Special Audit Services by phone or fax. The policy on key control provides that the Branch Manager has sole responsibility for the keys and that keys must not be left hanging on a hook or lying in a drawer where anybody may have access to them.

[10] The applicant's conduct in relation to the loss of the wall unit was clearly below the expectations of the respondent. As Branch Manager his conduct was lacking in the following respects:

10.1. He failed to take immediate steps to report to Head Office when Samariah Vilakati reported to him on Monday morning that the wall unit was missing from the warehouse.

10.2. The failure to report was in breach of the respondent's policy of Notifiable Incident Report ("NIR") exhibit "R2".

10.3. He failed to do anything about the report until Friday which was the weekly stock take day.

[11] The second act of misconduct levelled against the applicant related to the removal of repossessed stock, namely a stove, without completing the required documentation. The evidence revealed that the respondent would repossess goods from customers who were unable to pay. These items would then be sold to second-hand furniture dealers. The respondent's staff members were not allowed to buy repossessed goods. The

applicant said he bought the repossessed stove from the second hand furniture dealer after the goods had been bought from the respondent and kept at Nhlango branch because he intended to take it to his grandmother at Lavumisa.

The applicant clearly had no answer to this misconduct. First there was no record that the applicant bought the stove. The second-hand furniture dealer also failed to produce any documents at the disciplinary hearing. The applicant said he paid E600:00 cash for the stove but he failed to produce the till slip. Second; the applicant said that he did not require any documentation to have the stove removed from the respondent's premises because he had arranged with the Nhlango branch manager to keep the stove there, but he failed to call that person at the disciplinary hearing or before the court to confirm that.

The third act of misconduct by the applicant related to an incident that occurred in Carolina. The evidence showed that one of the drivers of the respondent based at the Mbabane branch ran out of fuel on his trip from Johannesburg where he had gone to collect new stock. The garage at Carolina did not accept the respondent's petrol card that the driver, England Zwane was carrying. Zwane then telephoned the applicant because the Mbabane Branch Manager could not be reached at that time. The applicant then took a decision that the driver leaves a base set as security for E150:00 worth of fuel. There was a dispute as to when did this incident take place between June and August 1998. The respondent said it was in June and the applicant said it was in August.

The issue with this misconduct was that the applicant failed to follow up on this matter to have the garage paid the sum of E150:00 and the property of the respondent returned. In his defence the applicant suggested that this was a Mbabane Branch matter, and therefore he should not be saddled with the accusation of negligence. The applicant's defence is untenable. He is the one who made the decision and he had the duty therefore to see to it that the respondent's property was recovered. This version was clearly an after thought as he had earlier said that he was waiting for a company vehicle to make a trip to Johannesburg and that by the time he was suspended no company motor vehicle had gone to Johannesburg. If therefore he had handed the matter to the Mbabane Branch Manager, there was no need for him to be waiting for a motor vehicle that would make a trip to Johannesburg. The court comes to the

conclusion that the applicant was grossly negligent for failing to pay the money to the garage and reclaim the company property.

[15] The last charge was that of gross negligence. This charge related to fictitious invoices from a company that supplied the respondent with electronic products called Swazi Sung. The invoices had fictitious order numbers giving the impression that the respondent had ordered the goods and/or taken delivery of the goods and therefore payment was going to be made. The evidence revealed that this fraud was being perpetrated by unknown people and that some of the employees of the respondent were involved as some of these invoices had the company stamp of the respondent and were signed by the employees of the respondent

[16] The gross negligence or misconduct alleged against the applicant was that when he discovered or got to be aware of these invoices, he did not take prompt action to counteract the fraud and also that he failed to immediately report to Head Office. RW3, Errol Kingsley said it was not the applicant's duty to investigate as the company had its own investigating department at Head Office. The evidence revealed that almost a year lapsed without the respondent paying, yet the applicant did not enquire with Head Office about the status of these invoices.

[17] The applicant had a telephone conversation with the officials of Swazi Sung about the non-payment. The applicant did not come out clearly and tell them that the respondent was not going to pay as the invoices were fraudulent. This conduct by the applicant created the impression that the respondent was going to make payment.

[18] The applicant did not take any disciplinary action against the employees whose signatures appeared on the invoices. The applicant clearly had an unusual managerial style. Unfortunately this was to the prejudice and financial loss of the respondent. As a manager the applicant was duty bound to act in the best interests of his employer, the respondent. As a witness the applicant was clearly unimpressive. He suppressed certain evidence and only to reveal it under the close scrutiny of the cross-examiner. He tried

to give the court the picture that after his dismissal he became a desperate person, when in fact he went to study overseas and also ran a family business.

[19] To justify dismissal, the misconduct must be work related and must be of such a nature as to render the employee unfit for employment in the employer's business or to render the continuation of the employment relationship intolerable. At Common law misconduct which has been held to justify summary dismissal includes dishonesty and gross negligence.

See: John Grogan: Workplace Law 8th edition at page 157.

[20] On the totality of the evidence before the court we come to the conclusion that the respondent has proved on a balance of probabilities that the applicant was grossly negligent in the manner that he executed his duties as Branch Manager of the respondent.

[21] The court will therefore come to the conclusion that the dismissal of the applicant by the respondent was fair and was in terms of section 36 of the Employment Act. The application is accordingly dismissed with costs.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT