

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 50/05**

In the matter between:

MENZI NGCAMPHALALALA**Applicant**

and

SWAZILAND BUILDING SOCIETY**Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : S. MDLADLA****FOR RESPONDENT : S. SHONGWE**

J U D G E M E N T – 08/10/2008

1. The present matter is an application for determination of an unresolved employment dispute arising from the termination of the Applicant's services by the Respondent.
2. The Applicant was employed by the Respondent in 1986. When his employment was terminated on 10th May 2004 he was the branch controller or manager of the Respondent's Sikhulile branch at Manzini. His immediate supervisor was one Jabulani Manana, the Respondent's

area manager responsible for Nhlangano and Manzini branches.

3. It is common cause that on the evening of the 8th March 2004 the Applicant quarreled with his wife and during the fracas she was hurt. In the evening of the following day the Applicant was arrested by the Police on a charge of assaulting his wife. He was detained overnight at Manzini Police station.
4. On 10th March 2004 before 8 a.m. the Applicant telephoned work. His supervisor was not in, so he informed a subordinate Mr. Mlambo that he was unable to report to work due to family problems but he would come to work after resolving the problems. He requested Mlambo to pass on his report to his supervisor Manana. At about 9 a.m. the same day he sent his brother to the branch to confirm that he was held up due to family problems. Manana was still not in, but the brother confirmed with Mlambo that Manana would be told that the Applicant was absent due to family problems.
5. The Applicant was eventually released on bail shortly after 3 p.m. He was not feeling well due to stress and lack of sleep, so he consulted a doctor at Sibonginkosi Medical Centre. The doctor told him to rest, and gave him one day off work for purposes of recovery. From the doctor he went to the branch to check that everything was alright. Mlambo told him that his report of absence had been passed on to Manana. The Applicant then went home to rest.
6. The Applicant reported for duty the following morning, which was the 11th March 2004. He met with Mr. Manana in the latter's office at about 11 a.m. There is a dispute between the Applicant and the

Respondent as to what exactly the Applicant told Manana with regard to his absence on the previous day. This dispute is central to the present case, because the Applicant was subsequently dismissed for dishonestly failing to disclose the true reason for his absence. The Applicant's version is that he told Manana about his family problems and mentioned that he had been detained by the Police and that he thereafter consulted a doctor. The Respondent's version is that the Applicant misled Manana by telling him that he had been ill and given the previous day off by his doctor, and he failed to disclose his incarceration by the Police.

7. It is also common cause that on 15th March 2004 Manana requested to be given the sick sheet the Applicant had received from his doctor on 10th March 2004, and that Applicant fetched the sick sheet from his office and gave it to Manana.
8. Members of staff at Sikhulile branch came across the sick sheet and on 16th March 2004 they took it upon themselves to write a "whistleblowing" letter to Manana the area manager. In their letter they accuse the Applicant of forging the sick sheet since to their knowledge he was in police custody on 10th March 2004. They allege that the Applicant is a dishonest manager who has tarnished the reputation of the Respondent.
9. This letter was not brought to the attention of the Applicant. However on 19th March 2004 Manana requested him to write a full report explaining the reasons for his absence on 10th March 2004.

The Applicant wrote the report on 21st March 2004 and gave it to Manana. The report reads as follows:

“Dear Mr. Manana,

I refer to your enquiry regarding my absence from work on Wednesday, 10th March 2004.

As I informed you verbally on the morning of 11th March, following a family squabble, I was called to Manzini Police Station on the evening 9th March for questioning and was detained overnight.

Before 8.00 a.m. on the 10th March, I informed Ntsika Mlambo that, because of personal problems, I could not attend work that morning but would report as soon as the matter had been resolved. I made arrangements with Mr. Mlambo for the operation of the office to be carried out as normal. Both my brother Mr. Dumisane Ngcamphalala and my sister Ms. Philani Ngcamphalala visited the office around 8.00 – 9.00 am to confirm that I was not able to attend work for family reasons.

I am unaccustomed to being in Police custody, and on being released from the Police Station, as I was in a state of anxiety and feeling unwell, I consulted my doctor. I eventually reported to the office later in the day and closed the office as normal at the end of the day’s business.

Yours sincerely

Menzi Ngcamphalala”

10. Manana did not react to this report, but on 31st March 2004 he served the Applicant with notice of a disciplinary hearing. The notice called upon the Applicant to answer to two charges:
- Tarnishing the image of the Society by committing a criminal offence of violence which resulted in you being kept in Police custody from the 9th to 10th instant.
 - Dishonesty in that you failed to disclose the truth why you did not report for work on the 10th instant.
11. The hearing was set for 5th April 2004 at Sikhulile Conference Room. The Applicant arranged for a manager from head office in Mbabane to represent him. At the eleventh hour, when the hearing due to commence, this manager telephoned to say he could not come as he was held up at work. The Applicant was obliged to request a different manager from head office to represent him. He explained his difficulty to Manana, who was initiator of the disciplinary charges, and the chairman. The hearing was delayed until the representative arrived. At that stage the Applicant applied for a postponement since he had not had any chance to consult with his new representative and he was not ready to proceed. The chairman refused the postponement and insisted that the hearing proceed.
12. The chairman was one Jansen Mkhweli, who was not an employee of the Respondent. The Applicant objected to Mkhweli presiding

because in terms of the Respondent's Disciplinary Code and Procedures the hearing should have been chaired by a senior manager of the Respondent. This objection was dismissed on the basis that the Code only applied to unionisable employees, and the hearing proceeded.

13. At the end of the hearing the Applicant was found guilty on both charges. No minutes of the hearing have been produced in evidence, but the Findings of the chairman were produced as an exhibit. These Findings contain a fairly detailed summary of the evidence led at the hearing, the arguments raised by the parties, and the chairman's reasons for judgement. Whilst the Findings do not constitute a complete record of the evidence given at the hearing, they were obviously prepared from the chairman's own record of the proceedings and they may be relied upon as recording the gist of what was said at the hearing. The Applicant and Mr. Manana both agreed that what is contained in the Findings is substantially correct. Further reference to the Findings shall be made during this judgement.
14. After considering mitigating and aggravating factors, the chairman recommended that the Applicant be given a written warning for tarnishing the image of the Respondent, and that he be dismissed for dishonesty for not telling the truth about the reason for his absence on 10th March 2004.
15. On 15th April 2004 the Applicant was summarily dismissed from the employ of the Respondent. The letter of dismissal was signed by Manana in his capacity as area manager. The letter confirms the

written warning for tarnishing the image of the Respondent. In respect of the charge of dishonesty, the letter states:

“It was established as follows:

- (a) That you deceived the initiator/your manager on your return from custody on 11th March 2004 into believing that your reasons for not reporting to work on the 10th March were as a result of illness, which it was not.*
- (b) You further provided a sick note to the effect that you were put-off sick, in the full knowledge that reasons for not reporting for work was due to being held in custody for a greater part of the day in question.*
- (c) The conclusion drawn from this is that your actions were calculated to cover up for your absence on the 10th March 2004 and were for all intents and purposes deceptive.....*

Under the circumstances, having taken into account your previous performance and service record, experience and seniority in the institution where you are handling a position of trust, we are of the view that you compromised on your integrity to a point where the Society cannot reasonably be expected to continue with your employment, and we have come to the conclusion that you be summarily dismissed with immediate effect in terms of section 36 (b) of the Employment Act.”

16. The Applicant's appeal to the managing director was unsuccessful. He then reported an unfair dismissal dispute to CMAC. After conciliation the dispute was certified unresolved and the Applicant instituted proceedings in the Industrial Court claiming payment of notice pay, additional notice pay, severance allowance and maximum compensation for unfair dismissal. At the hearing an alternative prayer for reinstatement was added with the leave of the court.
17. The Respondent in its Reply denies that the dismissal of the Applicant was substantively and procedurally unfair, but does not plead any fair reason for the dismissal. The Respondent's counsel stated in his opening address that the Respondent relies upon section 36(b) of the Employment Act in that the Applicant was guilty of committing an act of dishonesty.

ONUS OF PROOF

18. It is common cause that the Applicant was, at the date of his dismissal, an employee to whom section 35 of the employment Act 1980 applied. In terms of section 42 of the Act, the onus rests on the Respondent to prove that it had fair reason to terminate the Applicant's services, and that such termination was substantively and procedurally fair and reasonable in all the circumstances.
19. Since the Respondent relies on section 36 (b) of the Act, the onus rests on the Respondent to prove on a balance of probabilities that the Applicant was guilty of committing a dishonest act. The specific act of dishonesty which the Respondent alleges and is required to prove is particularized in the letter of dismissal (*supra* at paragraph 15)), namely that the Applicant, in order to cover up the fact that he had

been detained by the police, deliberately deceived Manana into believing he had not reported for work due to illness and gave him the sick sheet as part of that deception.

THE EVIDENCE

20. The Applicant testified that he told Manana everything that had happened to him, including that he was arrested by the police and that he visited a doctor after he was released on bail. He denied that he gave his illness as the reason why he never attended at work. He said if he had intended to deceive Manana he would have given him the sick sheet on the 11th March, but he never handed it over at this stage because he did not rely on it as an excuse for his absence.
21. The Applicant said that on 15th March Manana called him to his office and told him that head office were querying the reason for his absence on the 10th March. Manana said he remembered the Applicant mentioning that he had consulted a doctor, and enquired whether the doctor had given him a sick sheet. When the Applicant replied in the affirmative, Manana asked for it. The Applicant fetched it from his office and gave it to Manana.
22. The Applicant further testified that on the 19th March he was again called by Manana, who told him that he was having problems because head office did not understand his explanation for the Applicant's absence. He asked the Applicant to write a report explaining exactly what happened on the 10th. The Applicant wrote a report and gave it to Manana on 21st March.

23. The Applicant was subjected to a lengthy and painstaking cross-examination, much of which was directed to show improbabilities in his version of events. With regard to the Applicant's factual account of what transpired between himself and Manana on 11th and 15th March 2004, the Applicant stuck to his version and his testimony was relatively unshaken.
24. The version of events given in the Applicant's testimony tallies with the explanation he recorded in his report dated 21st March. As best as can be ascertained from the Findings of the chairman, the Applicant also gave the same version at his disciplinary hearing.
25. If the Applicant's version is correct, Manana instigated a false charge of dishonesty against him. Since it is unlikely that a senior manager would instigate a false charge without some ulterior motive, the Applicant no doubt understood the need to suggest some such motive. He submitted in his evidence that Manana instigated a false charge against him because of their bad working relationship. He referred to various incidents which he submitted indicate that Manana bears ill feelings towards him. The incidents he described illustrate the workplace tensions that may exist between a supervisor and his subordinate but do not in our view establish a relationship so bad as to supply a motive for malicious conduct. The Applicant certainly did not perceive his relationship with Manana as bad when he met with him on 11th March and discussed his family problems with him. We find the Applicant's suggestion that Manana instigated the charges against the Applicant due to their bad relationship to be improbable.

26. The rejection of the Applicant's conjecture as to Manana's possible motive does not necessarily discredit his evidence on the factual events since he has not been shown to have lied but merely to have advanced an improbable conjecture. It remains to consider after examining all the evidence whether there could be any other possible reason why Manana would have been willing to lie against the Applicant.
27. The Respondent's witness Jabulani Manana testified that the Applicant came to his office on 11th March and explained that he was ill on the previous day and consequently had to go and see a doctor. He attributed his illness to family problems. He never mentioned his arrest and incarceration by the Police. Manana testified that he asked the Applicant for a sick sheet, and the Applicant promised to obtain one. Manana reported to head office that the Applicant had been absent due to illness. The Applicant eventually gave him the sick sheet on 15th March 2004 after Manana had to again ask him for it. Manana then sent the sick sheet to head office to bolster his explanation that the Applicant had been sick on the 10th March.
28. Manana testified that he subsequently received a call from someone in the human resources department at head office, who said he had received information that the Applicant was actually in police custody on the 10th March. Manana stated in his evidence in chief that this was how he found out that the Applicant had been incarcerated. He then confronted the Applicant, saying that he had received information that his absence was not due to illness, and he asked the Applicant to make a written report explaining the reasons

for his absence. After he received the report, he initiated disciplinary proceedings.

29. In cross-examination, Manana denied that the Applicant reported the reason for his absence as being family problems, and insisted that the reason given was illness due to family problems. We regard this evidence with a degree of scepticism. It is common cause that Mlambo reported to Manana that Applicant was not at work due to family problems, not illness. Manana agreed in his evidence that he and Applicant discussed the latter's family problems when they met on 11th March. In his Findings, the chairman of the disciplinary hearing records that it was common cause "*that defendant (Applicant) reported to initiator (Manana) the reasons for absence on 10.03.04 as family problems*".

30. In his evidence in chief the following exchange took place between Manana and his counsel:

"Counsel: *he told you that he had family problems and he had gone to a doctor?*

Manana: Yes.

Counsel: *What did you understand that statement from him to mean?*

Manana: *That statement to me meant that he was not feeling well and the doctor had given him a day off*"

31. On his own evidence, Manana was informed by the Applicant that he had family problems and that he had consulted a doctor. We are

troubled by Manana's selective interpretation of this information, to the extent that he informed head office that the reason for Applicant's absence was that he was ill and had been given the day off by a doctor, making no mention of the "family problems" component. This interpretation is in fact a distortion of what the Applicant told to Manana.

We shall return to this troubling aspect later in this judgement.

32. Manana's version was severely shaken in relation to the handing over of the sick sheet. He testified that he asked for this on 11th March but only received it on 15th March. The chairman's Findings record Manana as stating at the disciplinary hearing that the Applicant was asked to submit the sick sheet "*when information filtered in that the defendant (Applicant) had been arrested*". According to Manana's testimony, the information that Applicant had been arrested only came to his attention after he had submitted the sick sheet to head office.

33. The Applicant's version that Manana first asked for the sick sheet on 15th March was not challenged in cross-examination. In fact it was expressly put to the Applicant that Manana came to ask for the sick sheet on the 15th March. The Applicant's evidence was that Manana came to him on the 15th March and said, "*By the way, as you indicated whilst we were chatting the other day that you had seen the doctor, do you have the sick note?*" When this was put to Manana during cross-examination, he responded: "*That kind of conversation might have taken place.*"

34. All in all, the court formed a distinct impression that Manana tailored his evidence because he realized that asking for the sick sheet on the 15th March for the first time was inconsistent with his version that Applicant told him on 11th March that he was absent due to illness.
35. The other discrepancy in Manana's testimony relates to how he came to know that the Applicant had been incarcerated. In chief he said he got a call from someone at head office. At a later stage in his evidence in chief, after a 2 week adjournment, he changed to say he came to know when he received a petition from the Sikhulile staff members. If the Applicant never told Manana about his incarceration, we believe he would have a clear recollection of how and from whom he came to know that he had been lied to.
36. On the issue of whether Applicant disclosed to Manana that he had been arrested and detained by the police, it is a matter of the word of one witness against the other. The court is less inclined to believe Manana because his version of events as a whole has not been consistent and he has not shown himself to be an entirely credible witness.
37. Apart from comparing the relative credibility and consistency of the testimony of the Applicant and Manana, it is also necessary to look at the probabilities of their respective versions. We take the following probabilities into account:
- 37.1 We find it unlikely that the Applicant would have unburdened himself to Manana about his family problems without mentioning that there had been a serious family quarrel which

resulted in his arrest for assault.

37.2 The Applicant did not account administratively for his absence on the 10th March by filling out a leave application form. The Respondent argues that this implies that he relied on the sick sheet to account for his absence. The Applicant already had the doctor's sick sheet in his possession when he met with Manana on 11th March. It is highly improbable that he would not have handed it over if he relied on his illness and visit to the doctor to explain his absence from work – especially if Manana asked for it, as he alleges. It is far more likely that the Applicant never handed over the sick sheet because he did not rely on his illness as an excuse. We do consider that the Applicant should have filled out a leave form if he was absent due to family problems, but his failure to do so may as well be due to carelessness as an intention to deceive.

37.3 Counsel for Respondent argued that it is improbable that Applicant would have handed over the sick sheet on 15th March if he did not want his employer to rely on it. On Applicant's version, Manana asked for the sick sheet because head office had a problem with the explanation he (Manana) had given for Applicant's absence. As far as the Applicant was concerned, the sick sheet confirmed that he had visited a doctor after he was released from custody, and therefore corroborated that part of the explanation he had given Manana on the 11th March. We do not find the Applicant's version improbable in the circumstances.

- 37.4 The Applicant's report dated 21st March records that he informed Manana on the 11th March that he was detained overnight by the Police. We consider it unlikely that Applicant would have submitted a report to his supervisor which both he and the supervisor knew was false, particularly since at this stage the Applicant had no inkling that he was to be charged.
- 37.5 If the Applicant did submit a false report we would have expected a strong repudiation from Manana, if not immediately then at least at the disciplinary hearing. It is common cause that Manana never confronted the Applicant about his report, and the findings of the chairman do not reveal any direct repudiation of the report by Manana at the hearing.
- 37.6 In testing the Applicant's version of events, it is important to examine whether there is any reason why Manana could possibly lay a false charge and lie against the Applicant. We have found Applicant's conjecture of deliberate malice to be improbable. Another explanation does present itself: if Manana initially misled head office into believing that Applicant's absence was due to illness - either because this explanation was administratively convenient or because he saw no need to disclose the Applicant's personal problems to head office - the subsequent exposure of Applicant's incarceration would have compromised Manana and prompted him to sacrifice the Applicant to salvage his own integrity. We do not find that this is what occurred, merely that this is a possibility, which ties in with the Applicant's version.

38. Taking into account our reservations about the evidence of Manana and the improbabilities inherent in the version of the Respondent, and considering that Applicant's version of events was consistent and relatively unshaken, we find that the Respondent has failed to prove on a preponderance of probabilities that the Applicant failed to disclose the truth why he did not report for work on 10th March or that he deceived Manana into believing he had not reported for work due to illness and gave him the sick sheet as part of that deception.
39. The Respondent has not established that the Applicant was guilty of committing an act of dishonesty. It follows that the Respondent has failed to prove that the Applicant was dismissed for a fair reason permitted by section 36 of the employment Act. We find that the dismissal of the Applicant was substantively unfair.
40. We now turn to the issues relating to procedural fairness. With regard to the appointment of an external chairman for the disciplinary hearing, we consider that this fell within the disciplinary prerogative of the Respondent. Although such prerogative may be limited by the provisions of a collective agreement, in this case the collective agreement did not apply to managerial staff such as the Applicant.
41. The chairman's refusal to grant the Applicant a postponement at the commencement of the hearing was in our view unfair. Through no fault of the Applicant his chosen representative was unable to attend. He had not had any chance to consult with his new representative. By insisting that the hearing proceed, the chairman effectively denied the Applicant any proper representation.

42. During the hearing, Manana was the initiator and performed the role of prosecutor. This was most inadvisable, since Manana was the Respondent's main witness and the central issue to be decided at the hearing was whether the Applicant or Manana were telling the truth. This blurring of the roles of prosecutor and witness resulted in the procedural anomaly that Manana was not called as a witness, but instead he advanced his own version whilst he cross-examined the Applicant. The result of this was firstly that the Applicant was obliged to testify before he heard what the Respondent's main witness had to say against him. Secondly, he was denied a proper opportunity to cross-examine Manana. The court makes due allowance for procedural lapses in disciplinary hearings conducted by laypersons, but in this case the presiding officer was an external chairman chosen for his expertise and experience in handling such hearings. Moreover the procedural lapses referred to disadvantaged the Applicant in the conduct of his defence and occasioned him real prejudice.
43. The ambivalence of Mr. Manana's role in the disciplinary process was further compounded when he signed the dismissal letter. The chairman recommended the dismissal of the Applicant, but the decision to dismiss lay with the Respondent. It is not clear who at the Respondent's undertaking took the actual decision to dismiss, but the fact remains that the Respondent saw it fit to place the investigation, prosecution and punishment of the Applicant in the hands of Manana, notwithstanding that Manana's own integrity was in question at the disciplinary hearing. Whilst we do not find that this in itself amounted to procedural unfairness, it was certainly not in accordance with good disciplinary practice and procedure.
44. For the reasons stated in paragraphs 41 and 42 *supra* we find that

the Applicant's dismissal was also procedurally unfair.

45. The Applicant has claimed reinstatement. In considering whether to grant such relief we take the following factors into account:

45.1 The Applicant worked for the Respondent for a period of 18 years. During this period he worked his way up the ranks from enquiries clerk to branch controller, notwithstanding that his highest formal educational qualification is an 'O levels' certificate. The experience he gained and training courses he attended during his employment by the Respondent make him a valuable personnel asset for the Respondent but do not make him particularly marketable to any other employer. The Applicant is 44 years of age. It would be difficult for him to compete with younger and better qualified job applicants. In our view there is little prospect of the Applicant obtaining alternative employment at a managerial level equivalent to branch controller.

45.2 We accept the Applicant's evidence that the taint of his dismissal for dishonesty has made it impossible for him to obtain employment in the banking sector. This is especially the case in the small banking sector in Swaziland. Our finding that the Applicant has been unfairly dismissed is unlikely to remove the taint.

45.3 The Respondent did not lead any evidence to show that the Applicant was a poor performer or that he had a poor disciplinary record. The Applicant's evidence that management regarded him as knowledgeable and reliable

and entrusted him with important tasks such as setting up new branches at Manzini and Nhlangano was not denied.

45.4 Manana did not suggest that the circumstances surrounding the dismissal of the Applicant are such that a continued employment relationship would be intolerable. On the contrary he testified that he personally would have no problem with the Applicant being reinstated. He said that reinstatement was not possible however because the Applicant's position had been filled since his dismissal.

46. Section 16 of the Industrial Relations Act 2000 (as amended) makes reinstatement the primary remedy in the case of an unfair dismissal unless certain grounds exist to justify that reinstatement should not be granted in a particular case. The only ground alleged by the Respondent is that the Applicant's position has been filled.

47. The Applicant did not delay in reporting his unfair dismissal dispute to CMAC, and the Respondent was aware from the outset that the Applicant was claiming reinstatement. A claim for reinstatement cannot be defeated merely by filling the dismissed employee's position whilst the dispute awaits adjudication, otherwise the relief of reinstatement provided by the Act would be rendered nugatory. Section 16 of the Act requires the Respondent to go further and show on a balance of probabilities that it is not reasonably practicable for it to reinstate the Applicant. Discharging this onus requires more than a bald statement that the Applicant's position has been filled.

Collie Dlamini v Swaziland Electricity Board (IC Case No. 105/2005)

48. The court has not been told when the Applicant's position was filled, whether it was filled by internal appointment or external recruitment, and what are the circumstances of the current incumbent. No evidence has been led to show that the Applicant cannot be accommodated as a branch controller in the Respondent's undertaking even if his former position at Sikhulile branch is not currently vacant.

49. In our view this is a proper case for a reinstatement order, and the Respondent has failed to establish that reinstatement is not reasonably practicable.

50. Reinstatement will have the effect that the Applicant's employment is treated as if it had never been terminated, including the payment of salary and benefits payable by virtue of the employment. We consider that it would be unduly harsh on the Respondent to require payment of all arrear salaries and benefits from the date of termination to the date of reinstatement, particularly since it did not benefit from the Applicant's services during this period and it also cannot be held responsible for the delay in the case coming to trial. Section 16(1) of the Act permits the court to reinstate the Applicant from any date not earlier than the date of dismissal.

51. We make the following order:

- (a) The Respondent is ordered to reinstate the Applicant to his position as branch controller, or any other similar position of equivalent rank and remuneration in the Respondent's undertaking, with effect from 1st July 2007.**

(b) The Respondent is to pay the costs of the suit.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT