

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 377/08

In the matter between:

THOKO DLAMINI

Applicant

and

SIPHO MADZINANE N.O.

1ST Respondent

MORMOND ELECTRICAL CONTRACTORS

LIMITED

2ND Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : N. MANANA

FOR RESPONDENT : S. MADZINANE

J U D G E M E N T - 10/11/08

1. The Applicant was an employee of the Respondent and her duties included balancing and banking the Respondent's cash takings.

1. On 24th April 2008 the Applicant was found guilty by the chairman of a disciplinary enquiry on a charge of failing to record cash surpluses on a number of occasions. The chairman found that the Applicant must have stolen the surpluses and he recommended that her services be terminated. The Respondent accepted this recommendation and dismissed the Applicant.
2. The Applicant appealed against her dismissal. In her letter of appeal she referred to a number of irregularities which occurred at the disciplinary enquiry. Inter alia, she complained that the chairman had relied on hearsay evidence; that she had been denied a proper opportunity to challenge the evidence against her by cross examination of witnesses; and that the finding that she stole the alleged cash surpluses was untenable in view of the undisputed evidence that the cash takings passed through a number of person's hands without proper controls before reaching the Applicant..
3. The 1st Respondent was the appeal chairman. After examining the minutes of the enquiry, he appears to have concluded that the proceedings at the enquiry were indeed irregular because hearsay evidence was relied upon and the Applicant was denied the opportunity to cross examine the Respondent's witnesses. He refused to permit the Applicant to make representations on her appeal, and ruled that the matter be remitted to the disciplinary chairman for the hearing of further evidence to cure the irregularities.
4. The Applicant has now come to court seeking an order "reviewing and/or setting aside the decision of the 1st Respondent" on the grounds that the 1st Respondent acted ultra vires by remitting the matter back to the disciplinary chairman for the leading of further evidence.

5. The Applicant also prays for an order “directing the 1st Respondent to re-instate the Applicant to her post.”

6. The chairperson of a disciplinary appeal hearing has broad powers to ensure that the disciplinary outcome is lawful and fair. If it is established on appeal that the original hearing was procedurally irregular, he may cure the irregularities by rehearing the entire matter himself, (**Nasionale Parkeraad v Terblanche (1999) 20 ILJ 1520 LAC**) or he may remit the matter to the initial enquiry for rehearing – see **Grogan: Workplace Law (9th Ed) at p 205** and **Riekert: Basic Employment Law page 107**.

7. Remittal would not be fair or appropriate if the chairperson of the initial enquiry has been shown to be biased, or if the initial proceedings are entirely vitiated by some irredeemable irregularity – see **Grogan and Riekert (supra)**.

8. In the present matter we do not consider that the 1st Respondent acted ultra vires in remitting the matter to the initial enquiry chairman for leading of further evidence. This remittal will give the Applicant the opportunity to object to Peggy Mc Innes being called as a witness; to cross examine Mrs. Thompson and Peggy if they are called as witnesses; and to revisit the issue whether she can be blamed for alleged cash shortages in the absence of proper cash handling controls. In our view the remittal of the matter does not prejudice the Applicant's right to a fair disciplinary hearing.

9. With regard to the Applicant's claim that she be reinstated to her employment, it is clear from the ruling of the 1st Respondent on appeal that the matter was remitted for the chairman of the enquiry to reconsider his verdict after hearing

further evidence. The effect of this ruling is that the guilty verdict and the dismissal of the Applicant were set aside on appeal.

10. It follows that the Applicant was reinstated to her employment pending the outcome of the re-opened disciplinary enquiry. It is not disclosed in the papers before court whether the Applicant has been prevented from resuming her employment pending the outcome of the enquiry, or whether she is under suspension pending the outcome of the enquiry. Since all the facts are not before us, it would not be proper for the court to make a reinstatement order. We do however confirm that the Applicant is entitled to her remuneration for the period from 4th July 2008 until her employment is lawfully terminated, (subject to any suspension without pay for a maximum period of one month)

See Nikiwe Vallet Nkambule v Swaziland National Housing Board (unreported judgement in IC Case No. 100/03)

11. The application is dismissed. We make no order as to costs.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT