

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 64/2005**

In the matter between:

SANELE MKHONTA**Applicant**

and

SWAZILAND MEAT INDUSTRIES**Respondent****CORAM:**

P. R. DUNSEITH	:	PRESIDENT
JOSIAH YENDE	:	MEMBER
NICHOLAS MANANA	:	MEMBER

FOR APPLICANT	:	S. C. SIMELANE
FOR RESPONDENT	:	C. MOTSA

J U D G E M E N T – 4/03/09

1. The Applicant was employed by the Respondent in April 1999 as a truck conductor. His services were terminated on 19th January 2004 after he had been found guilty at a disciplinary hearing of stealing two pig carcasses.
2. The Applicant denies that he stole the carcasses, and he alleges that his dismissal was substantively and procedurally unfair. The dispute could not be resolved by conciliation, and the Applicant has applied to the Industrial Court for a determination. He

claims payment of statutory terminal benefits, leave pay and maximum compensation for unfair dismissal.

THE EVIDENCE

3. The Respondent, as its name suggests, produces meat for sale. It has its own piggery and abattoir at Simunye.
4. The dismissal of the Applicant arose from two incidents that occurred on 20th November and 19th December 2003 respectively.
5. According to the Applicant's testimony, he was the conductor on a truck which collected an order for pig carcasses from Simunye Piggery on 20th November. The driver of the truck was one Samuel Dlamini. The order was for 20 pigs, but the Piggery could only supply 19. The Applicant said they transported the pigs for delivery to A & L Distributors at Namboard at Nokwane. On delivery, A & L personnel enquired why 19 pigs were being delivered instead of the 20 ordered. He explained that they had been short-supplied. Later the Applicant was charged with having stolen the 1 pig short-delivered.
6. Under cross examination, the Applicant conceded that he had confused the dates and that the above incident described by him actually occurred on the 19th December 2003.
7. He was shown the invoice relating to the order. It is common cause that the invoice was prepared at Simunye Piggery and

signed by the Stock controller Jeffrey Dlamini. The invoice reflects an original entry of 19 pigs (baconers). The Applicant signed the invoice to acknowledge collection of 19 pigs for delivery to A & L. The invoice further shows that upon delivery at A & L, the quantity of pigs was amended from 19 to 18 because only 18 were delivered. The receiving officer of A & L and the Applicant signed against the amendment.

8. The Applicant agreed that there was a short-delivery of one pig on this occasion. Asked to explain, he said the invoice was incorrect and they were short-supplied one pig at Simunye. He said he was negligent not to notice that he signed for 19 pigs when only 18 were supplied. He said in any event the driver was responsible for checking the load. His duty was merely to load and off load. He signed the invoice at the driver's request but the driver was responsible for ensuring that what was written on the invoice tallied with the quantity loaded.
9. It transpired from the evidence of the Respondent that the proof of delivery for this invoice, showing a short –delivery, was missing in the Respondent's records. The Applicant said it was the responsibility of the driver to hand in the proof of delivery at the office.
10. The Respondent's Marketing Manager Ron Wood testified that the Respondent hires the truck used on this occasion from Mafutseni Transport, and the driver comes with the truck. He is not an employee of the Respondent and his only duty is to drive the truck. The Applicant as conductor is solely responsible for counting and checking stock during loading and off loading and

for signing the documentation. The porters at Simunye Piggery bring the carcasses to the truck and hook them up. The conductor pushes the hooks into the truck and ensures that the quantity by number and weight tally with the invoice. The driver sits in the cab - he has no responsibility to load or check the loading. The conductor is also responsible for ensuring that proof of delivery is delivered to the Sales Office.

11. Wood said that the Applicant gave a false story when he was confronted about the short-deliveries on both 20 November and 19th December. This was never put to the Applicant and we shall not have regard to evidence to which the Applicant was given no chance to respond when he was in the witness box.
12. The stock controller at Simunye Piggery, Jeffrey Dlamini, corroborated Wood that the conductor is responsible for counting the load and signing the invoice to acknowledge receipt. He said the security officer also checks that the quantity of carcasses loaded tallies with the invoice.
13. Jeffrey confirmed that there was an order for 20 pigs on 19 December but they were only able to slaughter and supply 19 because they were short of one pig. He said they loaded 19 pigs and the Applicant counted and signed for them. He said he was sure he did not load one short because his own stock records balanced thereafter.
14. At his disciplinary hearing the Applicant was charged with the theft of company property. During the hearing he constantly alluded to his own "negligence". The initiator Ron Wood then

asked the chairman to clarify whether the Applicant intended to plead guilty to theft or negligence. The Applicant's representative stated that he had only intended to plead guilty to negligence. At the end of the hearing the chairman appears to have relied on the plea of guilty as one of the reasons for finding the Applicant guilty as charged. He should not have done so. For purposes of this judgement, the court shall disregard the Applicant's plea of guilty at the disciplinary hearing.

15. With regard to the incident on the 20th November 2003, the Applicant was with the same driver Samuel Dlamini from Mafutseni Transport. They were instructed by telephone to collect a load of 80 pigs carcasses at Simunye Piggery for delivery to various customers. The Applicant said the driver was not given working attire i.e. boots and dustcoat, so he refused to assist with the loading. He sat in the truck and left the loading to the Applicant. The Applicant testified that he was too busy fetching the carcasses from the piggery fridge to count the quantity loaded. After the loading was complete the driver sent him to fetch the invoices. There were separate invoices for each customer to whom a load was to be delivered. He signed each invoice acknowledging receipt of the quantity and mass reflected therein. The pig carcasses were also marked with the name of the customer to whom they were to be delivered.
16. The Applicant said that after loading, they delivered 20 carcasses at Manzini Meat Market, then they returned to their work station since it was already 5 p.m. There they were told not to off load the pigs but to switch on the refrigerator in the truck and the driver was to park the truck at the Mafutseni

Transport yard at Mafutseni. The truck was locked and the key was taken by the driver. The Applicant was dropped off at eMhlaleni and the driver drove to Mafutseni by himself.

17. The Applicant said the following day they went to deliver 30 carcasses at A & L but there were only 29 in the truck. The rest of the deliveries were made. The Applicant said he gave the invoices to the driver to take to the security, since it was after knock - off time and he was rushing for a lift.
18. Under cross examination the Applicant admitted that he signed the invoice dated 20 November 2003 acknowledging receipt of 30 carcasses for delivery to A & L. The invoice also records that only 29 were delivered to A & L, and the Applicant signed to acknowledge the short- delivery. The Applicant said the shortage occurred because Simunye Piggery short-supplied one pig. He said the driver was supposed to have counted, not him. He said he was negligent for signing without counting.
19. The Applicant was asked whether the truck was sealed before Samuel Dlamini drove it to Mafutseni. He said they could not seal it because they came late to the workplace and the seals were locked away in the office.
20. It was put to the Applicant that at the disciplinary hearing he had said the proof of delivery was left in the truck, but he was now saying that he gave the invoice to the driver to take to security. The Applicant responded, *"I might make mistakes here and there because it is a long time."*

21. Ron Wood stated in his evidence that the proof of delivery for this invoice was also missing. He said the Applicant as conductor was responsible for any stock shortage, and he was responsible for delivering the proof of delivery to the Sales Office. Wood pointed out that the only proofs of delivery that went missing were for the two deliveries to A & L where there was one pig short on each occasion.
22. It was put to Wood that Applicant could not seal the load because the seals were locked away in the office. Wood replied that the security do have seals for sealing the petrol pumps but he could not say whether they had any on this day.
23. Jeffrey Dlamini insisted in his evidence that 30 pigs were loaded on the 20th November 2003. He said he had personally counted at the loading. The security also counted and did not report any shortfall. He said the Applicant hooked up the carcasses in the truck and counted at the same time. He said the Applicant was responsible for his load, and he signed the invoice to acknowledge receipt of 30 pigs.

ONUS OF PROOF

24. The Applicant was, at the date of dismissal, an employee to whom section 35 of the Employment Act 1980 applied. The onus of proof rests on the Respondent to prove that his dismissal was fair and reasonable – see section 42 of the Act.
25. The Respondent alleges that the Applicant was guilty of the theft of two pig carcasses, and it bears the onus of proving this

allegation. We are not concerned here with the criminal onus of proving guilt beyond a reasonable doubt, but the civil onus of proof on a balance of probabilities. As was held by the **South African Labour Court in Marapula & Others v Consteen (Pty) Ltd (1999) 20 ILJ 1837 (LC)** at para 33:

“The onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piece meal. They are part of a single investigation into the acceptability or otherwise of the employer’s version.”

26. Where the employer’s case, as in the present matter, relies largely upon circumstantial evidence of theft, an inference of guilt may be drawn where, on a preponderance of probabilities, it is the more natural, or plausible, conclusion from amongst several conceivable ones - see **Polgietersrus Platinum Ltd v CCMA & Others (1999) 20 ILJ 2679 (LC)**.

ANALYSIS OF EVIDENCE

27. It is common cause that there was one pig short -delivered to A & L on 20th November and 19th December 2003 respectively, and that the Applicant signed the invoice acknowledging the quantity of pigs supplied by Simunye Piggery. There are only two conceivable possibilities: either there was short supply of the pigs at the Piggery, or the missing pigs were stolen en route to A & L. The Applicant alleges there was a short supply, and pleads his own negligence in signing the invoices without properly checking the quantity loaded.

28. With regard to the stock shortage on 19th December 2003, the Applicant tried to “bamboozle” the court by suggesting that the shortage was due to Simunye Piggery under-supplying by one the original order for 20 pigs. The production of the invoice soon dispelled this suggestion by showing that 19 pigs were supplied but only 18 delivered. We do not believe this was an innocent mistake on the part of the Applicant.
29. The Applicant tried to blame the driver for the discrepancy, saying he was responsible for counting and checking the load. We reject this evidence. Both Ron Wood and Jeffrey Dlamini made a good impression as honest and truthful witnesses. We accept their unshaken testimony that the Applicant as conductor was responsible for the goods loaded to the truck, including responsibility for counting, checking and signing for the load at the Piggery. This is borne out by the fact that the Applicant did in fact sign the invoices and accept responsibility for the load, something he would not have done if it was not part and parcel of his duties. It is also reasonable and probable that the driver was an employee of Mafutseni Transport, the owner of the truck, and he would not be given responsibility over the property of the Respondent who was not his employer. Finally, we note from the minutes of the disciplinary hearing that the Applicant never suggested that it was not his responsibility to count the pigs. He said he was negligent in not counting properly.
30. It is extremely suspicious that the proof of delivery for this short-delivery went missing. The Respondent submitted that this was engineered in order to conceal the short delivery. The

Applicant's evidence with regard to the proof of delivery was most unsatisfactory. He said the invoices were left with the security, but on the evidence they returned to the work station during working hours and the invoice should have been delivered to the Sales Office. At the disciplinary hearing he said he left the proof of delivery in the truck.

31. If the Simunye Piggery had short - supplied one pig on 19 December, their records and stock on hand would not have reconciled thereafter. Yet Jeffrey Dlamini said his records balanced. The security check at Simunye also did not find any discrepancy between the stock loaded and the invoices.
32. The order was for 20 pigs but only 19 could be supplied. This fact alone would have concentrated the minds of both the Applicant and Jeffrey Dlamini when counting the pigs loaded and we think it is most unlikely that a mistake was made.
33. The court carefully observed the demeanour of the Applicant in the witness box. He struck us as sly and deceitful.
34. Whilst there is the slimmest of possibilities that one pig was short loaded at Simunye on 19th December and was spirited away by persons unknown, and that the Applicant negligently failed to observe or record the shortfall, the court finds on the totality of the facts and probabilities, after weighing the evidence of the Respondent's witnesses against that of the Applicant, that the possibility that the Applicant stole the pig is overwhelmingly more plausible.

35. It may be that the Applicant could not have stolen the pig without the knowledge of the driver, and vice versa. We are concerned here with the guilt of the Applicant, and it is our finding that he committed theft, whether with or without the driver's participation.
36. Regarding the short-delivery on the 20th November 2003, we find it improbable that the shortage was due to short-loading at Simunye, since no discrepancy appeared in the Simunye records and we find the evidence of Jeffrey preferable to that of the Applicant. Nevertheless the Respondent left a gaping loophole in its stock control system by permitting the truck to be parked overnight at Mafutseni without a record that the truck had been sealed. The driver said at the disciplinary hearing it was sealed, but he was not called to testify before court and we cannot rely on his hearsay testimony at the hearing.
37. Whilst the missing proof of delivery and similarity of this stock loss with that of the 19th December do cast a shadow of suspicion over the Applicant, the possibility that one pig was stolen from an unsealed truck at Mafutseni is so real and plausible that we cannot find on a preponderance of probabilities that the Applicant stole that pig.
38. The Respondent has discharged its onus of proving that the Applicant stole a pig and committed an act of gross dishonesty. As a conductor responsible for his load the Applicant was in a position of trust. The Respondent could not be expected to entrust its property into the care of a thief. It was fair and

reasonable in all the circumstances for the Respondent to terminate the Applicant's services.

39. In his particulars of claim the Applicant alleged that the chairperson of the disciplinary hearing was biased and he descended into the arena, but he did not raise this complaint in his oral testimony. The minutes of the disciplinary hearing do show a rigorous participation in the hearing by the chairperson, but there is no indication of bias. The chairperson called two witnesses to clarify certain of the issues raised, but we do not find that there was any infringement of the Applicant's right to a fair hearing.

40. In the result, the application is dismissed. We make no order as to the costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT