

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 158/2006

In the matter between:

BRIAN NKWANYANA

Applicant

and

SWAZILAND ELECTRICITY BOARD

Respondent

CORAM:

P. R. DUNSEITH	:	PRESIDENT
JOSIAH YENDE	:	MEMBER
NICHOLAS MANANA	:	MEMBER
FOR APPLICANT	:	NTSIKA FAKUDZE
FOR RESPONDENT	:	ZWELI JELE

J U D G E M E N T – 26/03/2009

1. The Applicant has applied to the court for determination of an unresolved dispute arising out of the termination of his services by the Respondent. He is claiming payment of statutory terminal benefits, the employer's contribution to the Pension Fund, and maximum compensation for unfair dismissal.
2. It is common cause that the Applicant was employed on 2nd March

1995 and his services were terminated on grounds of dishonesty on 17th June 2005 after a disciplinary hearing.

3. The Applicant alleges that the termination was substantively unfair because the charges of dishonesty were not proved at the hearing. He also alleges that the termination was procedurally unfair because:

3.1 the chairman at the hearing prevented him from calling a material witness in his defence;

3.2 the disciplinary chairman and the appeal chairman were being advised by the Industrial Relations Manager Alex Mdluli who had chaired an investigation into the charges against the Applicant.

4. The Respondent in its Reply avers that the Applicant's services were fairly terminated after he failed to exonerate himself from allegations of dishonesty, and the termination was reasonable in all the circumstances.

5. This court must conduct its own enquiry into the question whether the termination of the Applicant's services was fair and reasonable and arrive at its own decision on the facts and the law. To that end we shall have regard to the entire disciplinary process including all the evidence led at the disciplinary enquiry, as well as all the evidence led before us in court.

Swaziland United Bakeries v Armstrong Dlamini (Unreported ICA Case No. 117/94).

6. The Respondent bears the onus of proving that the termination of

the Applicant's services was both fair and reasonable in all the circumstances – see section 42 of the Employment Act 1980.

EVIDENCE

7. In 2004 the Applicant held the position of Senior Distribution Technician stationed at Hluti in charge of the Respondent's depot. His main duties were to manage and maintain the local electricity distribution network, attend to customer services, and manage the depot.
8. A private contractor called All Trade Marketing (Pty) Ltd ("ATM") was contracted by the Respondent to construct a perimeter blockware fence around the Hluti depot. After the contract had been completed, certain irregularities came to the attention of the Respondent which prompted it to appoint a committee to conduct an investigation. The chairman of this committee was the Respondent's Industrial Relations Manager Alex Mdluli.
9. In its report following its investigations, the committee alleged that the Applicant had irregularly accommodated the contractor ATM and its employees in an SEB house at Hluti depot, and collected rentals for his own enrichment. The committee recommended that disciplinary charges be instituted against the Applicant for this and other irregularities in connection with the ATM contract.
10. On the 9th February 2005 the Respondent's Distribution Manager wrote to the Applicant requiring his response to the allegations made in the investigation report. In his written response, the Applicant denied that he accommodated the contractor and its employees in

SEB accommodation. He also flatly denied collecting any rentals from the contractor.

11. The Respondent did not accept the Applicant's explanation and disciplinary charges were instituted. At the end of the hearing the Applicant was found guilty of gross dishonesty in that he accommodated the contractor in SEB premises without the approval of management and misappropriated the proceeds of rental for his own personal benefit. The Applicant's services were thereafter terminated with notice. He was paid one month's salary in lieu of notice. He forfeited the employer contributions to his Pension Fund.

12. The Applicant testified in court regarding the accommodation of the contractor in the SEB house at Hluti. He said the ATM director Sydney Zulu requested his help to find accommodation in the Hluti area, and he promised to enquire from a landlord of flats in the area. One day whilst he was in Manzini a clerk from the Hluti depot Gertie Maseko called to say the contractor had arrived and wanted to know if the Applicant has found accommodation for his employees. The Applicant told Gertie that he would be returning late but they should await his return. However after an hour Gertie called again to say that she had arranged temporary accommodation in a certain SEB house. This was a new house that had been allocated to an SEB employee called Mandla Nxumalo (who is now deceased). The house had certain minor defects which needed fixing, so Nxumalo had not yet taken full occupation, but the Applicant said that Gertie told him Nxumalo had agreed to the contractor using the house until alternate accommodation could be found.

13. It is common cause that Gertie is related to Sydney Zulu by

marriage. The Applicant felt that Gertie had bent the rules to accommodate her relative. He told her that the arrangement she had made was not proper and would get them into trouble. She assured him it was just a temporary arrangement.

14. The Applicant says on his return he found the contractor's employees in the house and Zulu had left. He called Zulu to say he must vacate the house because it was not proper for Gertie to allow them to stay there. Zulu promised to vacate, but did not do so. After about two weeks, Zulu returned to site in the company of the SEB civil superintendent Raphael Madzinane. The latter was the project manager responsible for the fencing contract at Hluti depot. The Applicant reminded Zulu that he must move out. Madzinane then intervened to say there was no problem with the contractor staying in the house since Nxumalo was not yet occupying it and he (Madzinane) intended giving the contractor the job of rectifying the defects in the house.
15. The Applicant said that after this authorization from Madzinane he allowed the contractor to continue occupying the house. Altogether, ATM occupied the house from February to July 2004, a period of 6 months.
16. The Applicant said he never received any rentals from ATM. He said there was a cheque of E700-00 which he once received from ATM, but this payment was made to him on behalf of Nxumalo, to whom the Applicant had loaned money. He met Zulu in the bank in Manzini, and the latter said he owed Nxumalo some money, and since Nxumalo in turn owed the Applicant, he proposed making out a cheque to the Applicant. According to the Applicant, this is how he

came to receive and cash an ATM cheque for E700-00.

17. The Respondent called Sydney Zulu as a witness. He testified that the Applicant agreed to rent an SEB house to ATM for accommodation of its employees. Zulu was initially uncertain as to the amount of rental agreed, but after he was shown the cheque for E700-00 he remembered that the agreed rental was E350-00 per month. He said the cheque was for June and July 2004 rent. He paid rent for the previous months to the Applicant in cash.
18. Zulu said that when he arrived on site at Hluti the Applicant was absent but when he was phoned he said they should await his return. He then left, leaving his employees to be accommodated by the Applicant on his return.
19. In cross examination Zulu denied the cheque was paid to the Applicant to settle a debt of Mandla Nxumalo. He said he knew nothing of any such debt. He also denied that Gertie arranged accommodation with Nxumalo. He said his arrangement was with the Applicant, not with Gertie or Nxumalo. He denied that the Applicant ever asked him to vacate the house.
20. Zulu agreed that the project manager Madzinane asked him to fix the defects in the house. He also agreed that he had a bad relationship with the Applicant due to disagreements about the contract, but he denied that he was fabricating his evidence to settle a grudge against the Applicant.
21. Gertie Maseko testified that when the contractor arrived she telephoned the Applicant and he told her they should await his arrival.

She knocked off and went to her house. That evening or the next the Applicant came to her house and asked her to accompany him to negotiate with Mandla Nxumalo for accommodation. They went to Nxumalo's house. Nxumalo agreed that the contractor could occupy the house allocated to him. The Applicant promised to buy him a "cold drink", which Gertie understood to be a euphemism for the payment of money.

22. Gertie admitted that Sydney Zulu is her relative by marriage, but she denied that she arranged his accommodation or procured the key from Nxumalo in the absence of the Applicant. She denied that the Applicant ever objected to the occupation of the house by ATM or had occasion to reprimand her for arranging such occupation.

23. The Respondent also called Raphael Madzinane, the civil superintendent and project manager. He said that he noticed that the contractor was occupying an SEB house at the Hluti depot, but he did not know how that came about. He denied that he ever approved or authorized such occupation, or that the Applicant protested to Zulu in his presence about the occupation. He said the contractor was paid a site establishment fee which included its accommodation, and the Respondent had no responsibility to provide accommodation. He confirmed authorizing the contractor to repair defects in the house, but he said those repairs were paid for and had nothing to do with accommodating the contractor. He said that the Applicant as depot manager was responsible to stop any unauthorized occupation of an SEB house at the depot.

24. The Respondent also called its former Distribution Manager Ernest Mkhonta as a witness. Mkhonta testified that the Applicant as depot

manager had custody and control of SEB assets and houses and that Madzinane had no authority to sanction the occupation of a house at the depot by the contractor. He said that an employee such as Nxumalo has no right to sublet a house allocated to him by the Respondent, and if the Applicant as depot manager wished to make some extraordinary arrangement he had to get managerial permission.

ANALYSIS OF THE EVIDENCE

25. The versions of the Applicant and the Respondent regarding the arrangement of accommodation for the contractor are mutually contradictory. It is necessary for the court to determine which is the most probable version.
26. Key aspects of the Applicant's version were denied by Sydney Zulu, Gertie Maseko and Raphael Madzinane. Zulu's evidence on the main issue, namely whether the Applicant arranged the accommodation in the SEB house in return for rental, was consistent and plausible. He was also corroborated by Gertie on this issue. It must be said that Zulu was evasive when questioned about the arrangement he made with Madzinane to repair defects in the house. This arrangement was, on the evidence, irregular and outside the contract tender. His evasiveness was in relation to this irregularity only, and in our view it does not taint his evidence on other issues.
27. Gertie's description of events was consistent and credible, though we suspect that she played a more active role in the accommodation of the contractor than she has let on. This is implicit in the Applicant inviting her to accompany him when he negotiated with Nxumalo for the use of the house. It is most improbable that Gertie would have

dared to accommodate the contractor in a SEB house without the Applicant's authority and direction. It is equally improbable that the Applicant would have permitted such an irregularity to persist for 2 weeks, and moreover failed to take disciplinary action against Gertie or report the irregularity to senior management.

28. In his letter of the 11th February 2005 in response to the investigation report, the Applicant makes no reference to Gertie as having given the key to the house to the contractor, nor does he claim that he reprimanded her for doing so. He also makes no mention of Madzinane having authorized the continued occupation of the contractor. In fact he states that "*the contractor promised to vacate but kept on postponing until the end of contractual period.*" The contents of the Applicant's letter are significantly inconsistent with the evidence he gave in court.
29. We accept the evidence of Ernest Mkhonta to the effect that Madzinane had no authority to permit the contractor to occupy a house at Hluti deport. Madzinane was the manager of the fencing project. He had no jurisdiction to interfere with the Applicant's management of the depot and the assets at the depot. We consider it most improbable that Madzinane purported to condone an irregular arrangement which the Applicant had already condemned as unacceptable. We consider it even more improbable that the Applicant would have accepted such an interference with his authority as depot manager.
30. We prefer Madzinane's evidence that he made no intervention in the matter of the contractor's accommodation, and that as far as he was concerned the repair of the defects had nothing to do with the

contractor being accommodated in the house.

31. The Applicant's explanation regarding the cheque for E700-00 struck the court as improbable and contrived. The explanation simply cannot stand against Zulu's positive and unshaken assertion that the cheque was payment for June and July rentals.
32. Having regard to all the evidence led and the probabilities of the respective versions of the parties, the court finds that the Respondent has proved, on a preponderance of probabilities, that the Applicant did enter into an arrangement with Sydney Zulu to accommodate the ATM employees in an SEB house at Hluti depot; that the Applicant had no authority to enter into such arrangement without the approval of senior management; that the Applicant charged and received rentals from ATM which he misappropriated for his own use and benefit; and that in so doing he abused the assets under his control and acted dishonestly against the interests of his employer the Respondent.
33. The Applicant abused his position of trust. Moreover he falsely denied his involvement and endeavoured to lay the blame upon his subordinate. In the judgement of the court, the Respondent had fair reason to terminate his services in terms of Section 36 (b) of the Employment Act 1980, and such termination was reasonable in all the circumstances. We accordingly hold that the termination of the Applicant's services was substantively fair.
34. With regard to the procedural fairness of the Applicant's dismissal, it is common cause that the Applicant brought Gertie Maseko from Hluti to Mbabane to testify at the disciplinary hearing on his behalf. The leading of evidence was at that stage already finished, and the hearing

had been postponed for closing submissions. Before the hearing commenced the Applicant brought Gertie into the room, but the chairman chased her out without ascertaining the reason for her presence. When the hearing commenced, the Applicant's representative explained that they wished to call a further witness. The chairman closeted himself *in camera* with the Industrial Relations Manager Alex Mdluli to seek advice, and on resuming the hearing he ruled that the witness could not be called because it was "too late".

35. Ernest Mkhonta, Distribution Manager at the time, was the initiator of the charges against the Applicant. The chairman did not ascertain whether he objected to Gertie being called as a witness. He told the court that as a matter of fact he had no objection.

36. The Applicant had brought Gertie as a witness to shed some light on how the contractor came to occupy the SEB house. From her testimony before court it seems unlikely that her evidence at the hearing would have been of much help to the Applicant, but he was certainly entitled to call her if he wished. The chairman did not come to court to explain his reasons for excluding Gertie as a witness. Ernest Mkhonta says he ruled it was "too late" to call her because the matter had been postponed for the filing of written submissions only, and the Applicant had not, prior to the hearing, furnished Gertie's name as an intended witness. None of these excuses are sufficient to justify preventing an employee from calling a material witness, particularly when the disciplinary charges are serious and may result in a dismissal. There is no prejudice the Respondent would have suffered if Gertie had been allowed to testify, and the initiator himself concedes this. In our view it was unfair for the chairman to prevent the Applicant from calling his witness.

37. It was also most irregular for the chairman to take advice from the Industrial Relations Manager *in camera*. Firstly, Alex Mdluli had chaired the investigation and recommended that the Applicant be charged. His advice could not be regarded as independent or objective, particularly when it came to a decision whether to exclude certain evidence. Secondly, it was improper for the chairman to confer with Mdluli in private. In **Graham Rudolph v Mananga College and another (unreported judgement in IC Case No. 94/2007)** we held that there is nothing wrong with the chairperson of a disciplinary hearing ascertaining the views of management on relevant matters of policy and procedure, but this should be done in open hearing. After all, the Applicant may have wished to challenge the advice given by Mdluli.
38. The court finds that the dismissal of the Applicant was procedurally unfair. After carefully considering all the relevant factors, including the Applicant's personal circumstances, his 10 years of service with the Respondent, his clean record, the serious nature of the procedural lapses, and taking into account the nature of the offence for which he was dismissed, we award him 3 months salary as compensation.
39. The Applicant was dismissed with notice, but he was not paid the additional notice to which he was entitled in terms of Section 33 (1)(c) of the Employment Act. We award him additional notice also.
40. The Applicant has claimed the employer's contribution to the Pension Fund which he forfeited upon his dismissal. The rules of the Pension Fund have not been placed before the court, so it is not possible for us to determine whether the forfeiture is permitted by the

rules. More importantly, the Applicant has not joined the Trustees of the Pension Fund, who would have a substantial interest in any order we make pertaining to the Applicant's pension benefits. We are unable to uphold this claim.

41. Judgement is entered against the Respondent for payment to the Applicant as follows:

Additional notice	E 12,768-84
Compensation	<u>27,666-00</u>
	<u>E 40,434-84</u>

We make no order as to the costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT