

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT **MBABANE**

CASE NO, 484/06

In the matter between:

SAMUEL DLAMINI

APPLICANT

And

A.D ENTERPRISES (PTY) LTD

RESPONDENT

CORAM:

N. NKONYANE D.

JUDGE

MANGO G.

MEMBER

NDZINISA

MEMBER

**FOR APPLICANT
FOR RESPONDENT**

**R. NDLANGAMANDLA
H.M. MDLULI**

JUDGEMENT 26.01.09

[1] This is **an** application for determination of an unresolved dispute brought by the applicant against the respondent. The applicant is an adult Swazi male of Matsapha. The respondent is a locally registered company having its principal place of business at Matsapha Industrial Site.

[2] In his papers the applicant stated that he was employed by the respondent in October 1989. He worked for the respondent continuously until 9 January 2004 when he was dismissed by the respondent after he was found guilty of attempted theft of a loaf of Cheddar cheese weighing 2.362kg.

[3] The applicant further averred that his dismissal was unfair both substantively and procedurally and not permitted by the labour laws of Swaziland. He is now asking the court to make an order reinstating him with arrear wages or alternatively an order for payment of terminal benefits and maximum compensation.

[4] The respondent is denying that the applicant's dismissal was procedurally and substantively unfair. The respondent averred that the applicant's dismissal was both substantively and procedurally fair considering the overwhelming evidence adduced during the disciplinary hearing.

[5] The evidence led before the court revealed that the applicant was employed by the respondent as a heavy duty driver. He was earning E2,396:00 per month. The respondent is a company that deals with perishable goods. These goods include milk and milk products like cheese. The respondent has a warehouse where it keeps the goods. The respondent sells these goods to various shops around the country. Most of the goods are stored in refrigerators and chillers. The main duty of the applicant was to drive the respondent's trucks to make deliveries to the shops that had ordered the goods.

[6] The daily routine of the applicant was to arrive at work early enough to wash the truck and fill it with fuel. He would then drive the truck to the loading bay and would come out of the truck to monitor the loading of the goods into the truck. As the driver of the truck the applicant was responsible for the goods that were in the truck, hence the requirement that he should supervise the loading process.

[7] After the loading the driver would close the door of the truck and then drive away towards the exit gate. At the gate there is a security officer who would inspect the goods loaded therein. The security person uses a printout of the invoice showing the items that have been

loaded into the truck. On this fateful day when the security officer searched the truck he found a loaf of Cheddar cheese behind the driver's seat. He did not immediately ask the applicant about the cheese, but waited for the two truck assistants to come out from the warehouse so that he could also ask them about what he had found in the truck.

[8] The two truck assistants came from the warehouse and when they got to the truck he enquired about the loaf of Cheddar cheese. The applicant and the two assistants said they did not know how the cheese came to be at that place. The security officer said at that time the cheese had shifted and was then under the middle passenger seat. The security officer then reported the matter to the Financial Manager, Mr. Grant Pike. The truck was released to go and make the deliveries. On the following day the applicant was served with a charge sheet.

[9] A disciplinary hearing was conducted. The applicant was represented by a shop steward by the name of Simphiwe Nonjola. The applicant was found guilty. He was advised of his right to appeal. He did not appeal.

[10] At the hearing the applicant wanted to be represented by his union, SCAWU. He was advised by the chairman that since this was an internal disciplinary hearing he could not be represented by a union member but he could make a formal request to that effect. The applicant however settled on being represented by a shop steward by the name of Simphiwe Nonjola. From the record of the disciplinary hearing annexure "SD5" it is not in doubt that all the applicant's rights were explained including the right to appeal.

[11] Further, during the hearing after the applicant had indicated that he wanted Simphiwe Nonjola to represent him, they were given time to

consult. When they returned they advised the chairman that they were ready to proceed. The hearing proceeded accordingly. The court therefore comes to the conclusion that a fair procedure was observed by the chairman of the disciplinary hearing.

[12] The evidence led showed that the applicant was the only one who had had access to the truck on that day before the cheese was found hidden under the seat of the truck. It was him who washed the truck, reversed it to the loading bay and closed the door after the loading. The applicant told the court that he did not know how the cheese came to be in the truck's cab as it was not there when he washed the truck in the morning.

[13] Indeed there was no direct evidence as to who placed the loaf of cheese behind the seat of the truck. The court will therefore make a conclusion from the circumstances of the case.

[14] The applicant was charged and found guilty of attempted theft. From the place where the cheese was found there is no doubt to the court that *contrectatio* had been effected. *Contrectatio* consists in an assumption of control of the *res* or property. It is therefore possible for the crime of theft to be complete even though the thief has not succeeded in removing the property from the room or premises.

See: **P.M.A. Hunt: South Africana Criminal Law and Procedure. Volume II Second Edition (Juta and Co. Ltd.) p.641.**

[15] There is no doubt that the cheese was put behind the seat of the truck with the intention of depriving the owner thereof. The evidence in this case revealed that:

- a) The applicant was responsible for the goods that were in the truck. He therefore had a duty to explain how the cheese came to be there and under the seat without an invoice.
- b) He was the only one who had had access to the truck's cab on that day before the loaf of cheese was found hidden under the driver's seat by the security person.

[16] Taking into account all these factors the court will come to the conclusion that the respondent has proved on a balance of probabilities that the applicant was the one who committed the crime with which he was charged. The court therefore comes to the conclusion that the dismissal of the applicant was substantively and procedurally fair.

[17] The applicant had served the respondent for about fourteen years. The applicant averred in paragraph 7.4 of his application that a sanction short of dismissal would have sufficed. This raises the question whether it was reasonable to dismiss the applicant taking into account all the circumstances of the case. The value of the item stolen may be so negligible such that the *de minimis* rule applies. In the present case however, the sole business of the respondent consists in the selling of these items, to wit, cheese and other perishables to customers. The theft or attempted theft of one of these items was therefore crippling to the respondent's business. In the case of **SiceSo Dlamini v Swaziland United Bakeries (PTY) LTD** case **No.286/2002** the applicant was dismissed after he was found guilty of theft of two loaves of bread after having served the respondent for six years. Theft at the workplace not only destroys the trust that should normally exist between the employer and the employee, it also has negative economic consequences.

[18] The court therefore will come to the conclusion that the applicant's dismissal was reasonable in the circumstances of this case. The court however, will make an order that the applicant be paid his outstanding leave days which in terms of prayer 5 is three days.

[19] Taking into account all the evidence led before the court and all the circumstances of this case the court will make the following order;

- c) **The application is dismissed.**
- d) **The respondent is to pay the applicant his outstanding leave days.**
- e) **There is no order as to costs.**

The members are in agreement.

A handwritten signature in black ink, consisting of a stylized 'N' and 'K' followed by a long horizontal stroke that curves upwards at the end.

NKOS NATHNKONYAN
JUDGE OF THE INDUSTRIAL COURT