IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 373/04**

In 4he matter between:

BHEKITHEMBA MANGO **APPLICANT**

And

MURTONS CANE CONTRACTORS (PTY) LTD **1st RESPONDENT**

CORAM:

NKOSINATHI NKONYANE GILBERT **JUDGE MEMBER**

NDZINISA ANDREAS NKAMBULE

FOR APPLICANT FOR RESPONDENT **M. MKHWANAZI K. MOTSA**

JUDGEMENT 11.06.09

[1] The applicant launched an application for determination of an unresolved dispute between him and the respondent in terms of the provisions of the Industrial Relations Act, 2000 as amended.

[2] The applicant stated in his application that he was employed by the respondent on 1st February 2001 as Operations Supervisor.

He worked continuously for the respondent until his dismissal on 23rd July 2004. The applicant averred that his dismissal was both substantively and procedurally unfair. The applicant is accordingly claiming payment of additional notice, leave pay, maximum compensation and overtime.

[3] The respondent denied that the applicant was unfairly dismissed. The respondent stated that the applicant was fairly dismissed after he was found guilty of insubordination by the chairman of the disciplinary hearing before whom the applicant appeared.

[4] The evidence led before the court revealed that the respondent is a company based in Big Bend. The company is involved in the business of harvnstinn f-ygur -ar- \v-.*oh is *iaUeh* iiiovo Sugar Company for the making of sugar and other related products. The company has a number of heavy machinery including tractors and harvesters. It also employs a number of employees many of whom are labourers. It is a family business.

[5] The applicant, prior to joining the respondent, was working in a certain shop in Big Bend. He was working together with the wife of the managing director of the respondent. She recruited him to work for the respondent and the applicant agreed. The applicant befriended the son of the managing director and was treated as part of the family. The applicant and the managing director's son, Lawrence Murton, would attend the gym together and also travelled to Durban together.

One day whilst the harvesting of sugar cane was going on, it was discovered that some of the cutting blades of the harvester needed to be changed as they had become blunt. The applicant and his assistant managed to change some of the cutting blades. Two cutting blades could not be changed as it was extremely difficult to remove the bolts that fastened the cutting blades. The machine was then driven to the workshop with a view to have a nut welded onto the head of the nut that had its corners stripped in order to facilitate the extraction of the bolt.

The applicant and his assistant could not finite fti§ job chey were doing on the machine. They resumed on the following morning. Whilst in the workshop, the applicant overheard the managing director Nigel Murton, giving instructions to his son Lawrence who was driving to the workshop. Nigel Murton was telling Lawrence to tell the applicant to stop "freaking" with the welding and instead to use a hammer and chisel. The applicant overheard this conversation through his two-way radio in his car. When

Lawrence arrived at the workshop he indeed relayed the message to the applicant. The applicant refused to do as instructed because the use of the hammer and chisel was not safe as he could hurt himself in the process. Lawrence became angry and used insultive language against the applicant. Lawrence told his father that the applicant was refusing to do as he was told. Nigel Murton then also drove to the workshop where he asked the applicant whether indeed he had refused to obey his orders. The applicant said Nigel Murton was so angry at him that he did not give him a chance to explain but said he wanted a "yes or no" answer. The applicant said he admitted that he had refused. The applicant was thus charged with insubordination. He was found guilty and dismissed. He appealed and the appeal was dismissed.

[8] ANALYSIS OF THE EVIDENCE:

The applicant conceded that he was paid additional notice and leave pay. The applicant however failed to show the court how he arrived at the figure of E34.642.24 which he claims is due for overtime. The burden r»f prop!" -vs* c ^ ippJ!-&ai3 U„ s!;&w that he was entitled to be paid overtime and that the overtime due to him amounted to E34.642.24. The employer only had the burden to prove or show that the employee was fairly dismissed.

See: **Section 42(2)(a) & (b) of the Employment Act, 1980 as amended.**

[9] The evidence led in court showed that the applicant was part of management and was paid a monthly salary unlike the other workers who were daily rated. Further the evidence showed that the applicant was getting off days at certain regular intervals. It is therefore not clear to the court why is the applicant claiming the payment of overtime when he was in the management category and was also getting off-days. The applicant is claiming payment of overtime from 2001 to 2004. The respondent argued further that even if the overtime was due to the applicant, the claim is now time

barred having been reported six months after it arose in 2001. The court has no jurisdiction to entertain disputes reported after six months the dispute first arose between the parties.

See: **Harpet Van Seggelen v. Swazi Spa Holdings**
Case No. 390/2004.

[10] For the reasons mentioned in the two preceding paragraphs, the applicant's claim for ovortirm- *w^f** tc *"JC '"ZZ^M-CJ*

[11] The remaining claim therefore is that of maximum compensation. The court must enquire if indeed the applicant was unfairly dismissed by the respondent either because there was no substantive ground for the dismissal or the respondent did not follow the procedural requirements for a fair dismissal.

[12] The evidence revealed that the applicant was charged with insubordination and appeared before a disciplinary committee chaired by a certain Carol Ngcobo. The applicant told the court that Carol was not an impartial chairperson because of her previous association with Mr. Nigel Murton when the two were employees of lllovo Sugar Company. At the time of hearing the applicant was aware of this situation but he did not raise any objection. There was no evidence or any suggestion that Carol Ngcobo was influenced by her former association with Mr. Nigel Murton to arrive at the decision that she arrived at. In any event, the applicant did not raise this as one of the grounds for his appeal. It seems to the court that this argument by the applicant was an afterthought.

[13] The evidence however showed that after the parties had testified and Carol handed down her verdict, she did not give the applicant an opportunity to mitigate before she passed the sentence. This lapse in procedure clearly tainted the process and it cannot be ignored by the court. Mr. Motsa on behalf of the respondent argued thst the

applicant was not s^rwysly prejudiced as the managing director, Nigel Murton, was also not given the opportunity to address the chairperson on aggravating circumstances. We do not agree with this argument. It would be dangerous for the court to approach issues of legal rights and fairness from the perspective that if an irregularity affected both parties it should be condoned by the court. The applicant was prejudiced by not being given the opportunity to address the chairperson on mitigating circumstances before the imposition of the penalty. The dismissal of the applicant was therefore procedurally unfair.

[14] The applicant did not refuse to carry out the instruction. He merely refused to carry out the instruction in the way suggested by his employer. The question that the court must answer therefore is whether the applicant was justified in his conduct of refusing to carry out the instruction in the mariner suggested by his employer. Put differently, did the applicant willfully refuse to obey the employer's instruction?

[15] The applicant's argument was that the method of removing the bolt suggested by the employer of using the hammer and chisel was dangerous, as he could miss the nut with the hammer and cause injury to his hand.

[16] The general position of the law is that the willful refusal to comply with a reasonable and l?.wfi>(instnrtici* of **thp** eriV.o>er may justify dismissal

See: **Mqhayi v. Van Leer SA (Pty) Ltd [1984] 5ILJ179(I.C.)**

Chemical Workers Industrial Union & Another v. AECI Paints Natal (Pty) Ltd [1988] 9 ILJ 1046 (IC).

[17] The gravity of the insubordination however depends on a number of

factors, including the action of the employer prior to the alleged insubordination, the willfulness of the employee's defiance and the reasonableness or otherwise of the order that was defied.

See. **John Grogan: Workplace Law 8th edition pp 176-177.**

In this case the applicant did not refuse to carry out the instruction because he was defying or challenging the authority of the managing director. The applicant refused to carry out the instruction because the manner suggested was dangerous. The court had the privilege of conducting an inspection in loco. We indeed saw that the area within which the applicant was required to carry out the task was restricted. If the applicant were to use the hammer and miss he was clearly going to hit h;,. par^s w«*κ tho Nn:mar Sesonr;, cscr'jic „ſ *iU** working area the applicant could easily get injured by the cutting blades.

During the inspection in loco Nigel Murton did get onto the harvester carrying the hammer and chisel. With a few slight taps on the nut, the bolt was loosened. The circumstances were however totally different. The bolt that the applicant had to take out was definitely more stubborn as they had first tried other means to remove that bolt and they had failed. The applicant therefore would have had to use more force than that which was used by Mr. Nigel Murton during the inspection in loco. To use greater force than that which Nigel Murton used, would definitely be dangerous as a miss with the hammer could have resulted in the applicant hitting his hand and also being cut by the blades. Taking into account the evidence of the safety officers and our own observations during the inspection in loco, we come to the conclusion that it was not unreasonable for the applicant to refuse to use the method suggested by the employer.

[20] In the circumstances of this case, the respondent has failed to prove on a balance of probabilities that the refusal to carry out the instruction by the applicant was willful and calculated to show

defiance to the authority of the employer. To the contrary, the evidence showed that the applicant did not refuse to carry out the instruction but merely refused to adopt the method suggested to him keoguss It was goiny to ax^jse him to danger. The court comes to the conclusion that, taking into account all the circumstances of the case, the conduct of the applicant was not unreasonable.

[21] The court therefore comes to the conclusion that the respondent has failed to prove on a preponderance of probabilities that the applicant wilfully refused to carry out the employer's instruction. The court comes to the conclusion that the refusal by the applicant to use the method suggested by the employer was not unreasonable as the method suggested was going to expose the applicant to danger. The applicant's application therefore ought to succeed.

RELIEF

The applicant is 29 years old. He is not married but he has one child. He is currently in a college in South Africa. He had only worked for the respondent for about three years and five months. Taking into account all these factors the court will award him an equivalent of three months' pay as compensation for the unfair dismissal.

Taking into account all the evidence before the court and also taking into account all the circumstances of the case the court will make the following order;

a) **Judgement is entered against the respondent.**

b) **The *r®spowten** is pay to tne applicant the sum of 16000:00 x 3) E18,000:00 as compensation for the unfair dismissal.**

c) **The respondent is to pay the costs of suit.**

The members agree.

NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT