

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 75/2004

In the matter between:

DUMISANE SIMELANE

1st APPLICANT

THE MBA NXUMALO

2nd APPLICANT

And

SWAZILAND BREWERIES

RESPONDENT

CORAM:

NDERINDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT ; S. MAGONGO

J U D G E M E N T - 15/09/09

The 1 Applicant is Dumsane Simelane. He was employed by the Respondent in 1999 and was in continuous employment until the 14th February 2003, when he was dismissed by the Respondent on allegations that he had stolen a crate of beer. At the time of the dismissal, the 1st Applicant worked as a driver and was earning a monthly salary of E1,863.00 per month.

On the other hand the 2nd Applicant is Themba Nxumalo. He was employed by the Respondent in 1993 and was in continuous employ thereof until the 14th February 2003. At the time of his dismissal, he worked as a truck helper and earned a monthly salary of E1,278.00 (One Thousand Two Hundred and Seventy Eight Emalangen).

The 1st and 2nd Applicants were charged with the same offence. It was alleged that a case of beer was found under the truck in which they worked.

The two testified before court in support of the particulars of claim. They denied the charges laid against them. They told the court that they were hurled before a disciplinary tribunal where they were tried for theft of a case of beer. They had similarly denied the charges but were both found guilty as charged. The two were dismissed. They both appealed against the decision to dismiss them. The appeal was dismissed. They reported a dispute to the Commissioner of Labour. The same was referred to the Conciliation, Mediation and Arbitration Commission (CMAC). Conciliation process did not resolve the dispute and a certificate of unresolved dispute was issued.

The matter was filed before court on the 18th March 2003.

The Respondent represented by the firm of Millin and Currie Attorneys filed its reply on the 20th April 2004, approximately a year after the claim was filed. No leave was sought to file the Reply inspite of the inordinate delay. Infact, the copy of the Reply in the Judge's file does not bear any court stamp, a matter that was not explained because the Respondent was not represented during the trial.

On the 11th February 2005, a Notice of Withdrawal and Substitution of Attorneys was filed by the firm of Currie & Sibandze attorneys.

A pre-trial conference was held on the 15th June 2004 wherein one Magongo appeared for the Applicants and Mr. T. Mofokeng represented the Respondent.

The matter was set down for trial to commence on the 9th September 2005 and the notice was served on the Respondent's attorneys on the 15th August 2005.

In spite of receipt of the Notice of Set Down, the Respondent was not represented on the date of the hearing. The matter proceeded ex parte since no explanation was offered for the non-appearance of the Respondent.

The evidence of the 1st and 2nd Applicants was therefore not controverted at all. The same was consistent and credible.

The onus of proving that the 1st and 2nd Applicants were dismissed for an offence permitted by Section 36 of the Employment Act lies with the Respondent in terms of Section 42 (2) (a) of the Act. By its default, the Respondent did not discharge this onus.

Furthermore, in terms of Section 42 (2) (b), the Respondent has an onus of showing that the dismissal of the 1st and 2nd Applicants was fair and reasonable in the circumstances of the case. Again the Respondent failed in this respect.

The 1st and 2nd Applicants were therefore dismissed unfairly in substance and procedure. Accordingly their Applications succeeded on the merits.

COMPENSATION

1st APPLICANT

The 1st Applicant was 32 years old. He was not married but had five minor children to take care of. He remained unemployed upon dismissal until the month of November 2004 when he got a job as a driver with Tholeni public transport. He earned E1,350.00 per month. He has thus suffered loss of income and hardship as a result of the unfair dismissal. He had served the Respondent for a period of four years.

The court in consideration of all these circumstances award him eight (8) months salary as compensation for the unfair dismissal.

2nd APPLICANT

The 2nd Applicant was 31 years old. He was married with one child. He had gotten temporary employment with Swaziland United Bakeries (SUB) as a driver in December 2003. He earned E322.00 (Three Hundred and Twenty Two Emalangeni) per week. He suffered loss of income and hardship. Like the 1st Applicant he had no record of misconduct at the work place prior to the allegations made against him. He had served the Respondent for a period of about ten (10) years.

Considering all the above circumstances, the court awards him ten (10) months salary as compensation for unfair dismissal.

TERMINAL BENEFITS

In addition the 1st Applicant is awarded, one months salary in lieu of notice in the sum of E1,863.00, additional notice of E859.80 and severance allowance of E2,149.00.

The 2nd Applicant is similarly awarded notice pay in the sum of E1,278.00, additional notice pay of E1,769.00 and severance allowance in the sum of E4,423.50.

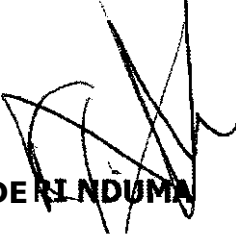
TOTAL AWARDS

1st Applicant total award is E19,775.80 (Nineteen Thousand Seven Hundred and Seventy Five Emalangeneni Eighty Cents).

2nd Applicant total award is E20,250.90 (Twenty Thousand Two Hundred and Fifty Emalangeneni Ninety Cents).

No order as to costs.

The members
agree.


NDE RI NDUMA

JUDGE-