

# IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 165/02

In the matter between:

**MUBI MUSA MABUZA**

**APPLICANT**

And

**UBOMBO SUGAR COMPANY**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE DAN**

**JUDGE MEMBER**

**MANGO GILBERT NDZINISA**

**MEMBER**

**FOR APPLICANT FOR  
RESPONDENT**

**MR. N. MTHETHWA MR.  
L. HOWE**

## **JUDGEMENT 15.09.09**

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

[2] The applicant is an adult male of Big Bend in the Lubombo District. The respondent is a local sugar producing company also based in Big Bend. The applicant was employed by the respondent as an irrigator in 1982. He was in the continuous employ of the respondent until 23 November 2001 when the respondent terminated his service for allegedly stealing the respondent's property.

[3] In his papers the applicant averred that the termination of his service was wrongful, unfair and unreasonable in all the circumstances because;

21.1 The respondent did not have fair and valid reasons for

terminating his service.

21.2 The dismissal was procedurally unfair.

[4] The applicant is accordingly asking the court to make an order that the respondent re-instates him or alternatively to pay him his terminal benefits and also compensation for the unfair dismissal.

[5] The application is opposed by the respondent. The respondent denied that the termination of the applicant's service was unfair and unlawful. In its reply the respondent stated that the applicant was participating and /or assisting in the theft of company property.

[6] The applicant's evidence in chief revealed that the applicant was employed by the respondent in 1982 as an irrigator. As an irrigator the applicant did other general duties assigned to him by his supervisor. His supervisor or Induna was one Zakhele Ndwandwe. One morning the applicant and other labourers were assigned the task of spreading or applying fertilizer in one of the respondent's sugar cane fields. The name of this field was Ndingilizi 3B.

[7] The applicant had first went to register with the supervisor at about 04:00 a.m. He was with Philemon Shongwe, Malindane Shongwe and a Dlamini employee whose name he could not recall. The tractor that came with the fertilizer arrived at about 06:00 a.m. The supervisor joined them at about 09:00 a.m with two other employees. There were then six employees working on the field. At 1:30 p.m. the supervisor told the applicant and the three other employees that clocked in earlier to leave. They did so. When they had walked away for about 200 metres, the tractor came behind them and they got on to the trailer in which were the two employees that they had left behind and also the supervisor. The tractor was being driven by Aaron Makama.

[8] The tractor stopped at the end of the field next to a water pump.

\_\_\_\_\_ Fiye ^a^oL fertilizer wej^

Makhanya and Mantongomane Shongwe. In the meantime

when the tractor had stopped the applicant said he went to answer the call of nature, that is, to urinate. The tractor started to drive away. He asked the driver to stop for him. He did so and the applicant climbed on to the trailer again. The tractor drove on and dropped them near the compound where they stayed.

[9] The applicant said two weeks later he went to the Magistrate's Court to hear his brother's case who had been charged with assault. In the court he found the supervisor, Zakhele Ndwandwa, Johannes Makhanya, Philemon Shongwe and also the Section Manager, Smodern Gamedze. The applicant said he found the court in session and Johannes Makhanya was giving evidence and was telling the court that he was sold some bags of fertilizer for E500:00 by Zakhele Ndwandwe. He said Zakhele Ndwandwe and Johannes Makhanya were sentenced to nine months. He said he learnt later that they paid a fine and were released.

[10] The applicant said on 23 November 2001 he was called by the Section Manager to his office. He accused the applicant of having stolen bags of fertilizer. The Section Manager then took the applicant by car to the main office where they found RW3, Enock Motsa, who eventually presided over the disciplinary hearing on that same day. The applicant said the two witnesses that testified against him were Zakhele Ndwandwa and Johannes Makhanya. He said he was represented by Malungisa Dlamini. The applicant however said he (the applicant) raised his hand to ask questions from the witnesses but the chairman refused him that opportunity.

[11] The applicant said he was charged with some of his colleagues and that one of them was however allowed to go back to work. The applicant said he appealed and the appeal chairman told him that there was no case against him but that he was afraid to reverse the decision for fear of being at loggerheads with the chairman of the

disciplinary hearing. He said he requested to appeal to the General Manager but was turned down. He then reported a dispute with CMAC. The dispute was not resolved hence he brought the matter to court. He said he was no longer asking for re-instatement as he was badly treated by the respondent as he was made to spend the night in the open after he was found guilty and his properties were damaged. He said he was never provided with transport to take his belongings home. He said he was not paid any terminal benefits.

[12] RW1, Smodern Gamedze, in chief, told the court that he got a report from the Supervisor that the fertilizer fell short of fertilizing the whole field. He said he began to investigate how that could have come about as the fertilizer to be used is calibrated and it is known how much fertilizer is needed for any particular size of land or area. He said when he asked the applicant how shortage came about on 15.11.01, the applicant told him that they applied the fertilizer well. RW1 said he interrogated the driver of the tractor, Aaron Makhanya who told him the whole story as to how the fertilizer went missing. RW1 told the court that it was not correct that the applicant was made to vacate the company house on the same day of the verdict of dismissal.

[13] RW2, Dr. Siphon Nkambule told the court that he was the appeal chairman. He said the applicant was represented by Malungisa Dlamini. He said the tape recordings of the disciplinary hearing were played. He said the applicant's ground of appeal was that he did not know that the bags were being stolen.

[14] RW3, Percy Maziya told the court that he was the Human Resources Manager when the applicant was dismissed. He said he was present during the disciplinary hearing and that his role was to assist on procedural issues. He said the procedure was followed.

[15] RW4, Enock Motsa told the court that he chaired the disciplinary

hearing of the applicant. He told the court that Makhanya told him that he was assisted by the applicant to offload the bags and that the applicant denied that.

[16] RW5, Mbhekwa Mkhwanazi told the court that he was employed by Satellite Security Company which provided security services to the respondent at the time of the applicant's dismissal. He said he recorded a statement from the applicant. The statement was handed in as Exhibit "F". He told the court that he was called by the Section Manager and Game Rangers who told the security personnel that there were bags of fertilizer found hidden in the fields. He said they went to the scene and they retrieved the bags and also took the suspects to the security office. He said the suspects were interviewed and they admitted that they hid the bags which were not used when they had gone to apply the fertilizer in the field. The suspects were then taken to the police station.

[16] During cross-examination RW5 told the court that two of the suspects were found guilty of theft by the Magistrate's Court. He said these were Zakhele Ndwandwe and Johannes Makhanya. RW5 admitted that the applicant was never charged with the crime of theft.

**[17] Analysis of the evidence**

The court deliberately narrated the applicant's evidence in more detail because there were crucial parts of his evidence that were not challenged during cross-examination. What was also striking in this case was that none of the applicant's co-employees that he was working with in the field were called as witnesses before the court. The respondent's case was largely based on the evidence of RW1, Smodern Gamedze and RW5 Mbhekwa Mkhwanazi.

The court was not told of the reasons why the workers that were with the applicant on the fateful day were not called to testify in court. The evidence of RW5 was confusing and clearly unreliable. He said they went to the place where the bags of fertilizer and the suspects were found. He said the

suspects confessed to the crime and made statements. He said the suspects were then handed to the police. RW5 did not mention the names of the suspects. He gave the impression that the applicant was one of these suspects that were arrested by some game rangers. From the evidence before court however it was clear that the applicant was not one of the suspects because;

21.3 There was no evidence that the applicant was ever arrested or handed over to the police.

21.4 In the statement of the applicant which was recorded by RW5, exhibit "F" there is nowhere in the statement where the applicant is confessing or admitting that he committed the alleged crime. The applicant statement reads as follows verbatim;

*"I do remember very well on 13/11/01, we were working at Ndingilizi 3B. When we finish to work we move with a tractor to our compound. The tractor was driven by Makamo. When we were next to Marufa 20 pump station-*

*Makhanya off load 5 bags of blend fertilizer. After that we move to our compound."*

21.5 The place referred to as next to Marula 20 pump station by the applicant, is the spot where the bags were first offloaded from the tractor, not the final place in the bush where those that were hiding the bags were caught by the game rangers.

21.6 If the applicant was one of the people who were caught red-handed by some game rangers hiding the bags in the bush, it is not clear why he was not handed to the police and thereafter prosecuted or made a state witness as was done to Zakhele Ndwandwe and Johannes Makhanya.

21.7 The applicant was never charged with theft of the five bags of fertilizer even though RW5 said the suspects were caught red handed with the stolen bags of fertilizer.

The court therefore comes to the conclusion that the respondent failed to prove on a balance of probabilities that the applicant was one of the people who were found hiding the bags of fertilizer by game rangers in a forest. None of those people testified in court, nor were the said game rangers brought to court to testify as to where these people that they caught red handed hiding the bags of fertilizer in the bush.

[20] The respondent also relied on the evidence of RW1 Smodern Gamedze. RW1 told the court that he got a report from the supervisor, Zakhele Ndwandwe that the issued fertilizer fell short of covering the whole field. RW1 said he then started to investigate how that came about. RW1 then asked the applicant about this. The applicant told RW1 that they applied the fertilizer well in the field and did not think that there was any foul play. It was on the basis of this response that the applicant was charged with participating or assisting in the theft of the company fertilizer.

[21] It is not clear to the court why did the respondent come to the conclusion that applicant knew or ought to have known that the fertilizer was being stolen when it was offloaded from the tractor on the edge of the field. The conclusion that the respondent arrived at is clearly not supported by the evidence before the court.

21.8 The evidence by the applicant showed that he and three of his colleagues were allowed by the supervisor to break early as



they had resumed work earlier than the two other labourers.

21.9 The tractor came behind the applicant and his three colleagues with the bags and they were given a lift by the driver. The tractor stopped and the bags were offloaded in broad daylight in the presence of the supervisor of the applicant, Zakhele Ndwandwe.

[22] During cross-examination the applicant told the court that the place where the bags were offloaded was clear as the grass had been cut by the tractor drawn lawn mower. When the bags were offloaded, the supervisor who was in authority over the applicant and the other workers was also present. These circumstances clearly do not warrant the conclusion by the respondent that the applicant should have been suspicious as all this happened in the presence of the supervisor.

[23] When RW1 asked the applicant about the fertilizer, RW1 was investigating the cause of the shortage of the fertilizer as he had been told by the supervisor that not all the field was fertilized. RW1 at that stage was not investigating the theft of the five bags of fertilizer. There was therefore nothing wrong with the applicant's answer that they applied the fertilizer well. The applicant and his three colleagues left the place where they were working earlier than the supervisor and the two other workers. There was no evidence that the applicant was in fact aware that his colleagues that he had left behind with the supervisor did not apply all the fertilizer to the field.

[24] RW1 said he then went on a long weekend and returned on a Monday. He said he then went to see Makama who told him the whole story about how the bags of fertilizer went missing. What Aaron Makama told RW1 was clearly inadmissible hearsay evidence.

The applicant's evidence that he did not know anything about stolen bags of fertilizer was therefore correct. The last time that the applicant saw the bags of fertilizer was when they were offloaded from the tractor trailer at the edge of the field in the presence of the supervisor who was in charge of the workers. The applicant did not know that the bags were going to be moved to a different place to be hidden. The bags were later removed to another spot in the forest. Those who were removing the bags were caught by game rangers and handed over to the security who in turn handed them over to the police.

This case is clearly distinguishable from that of **Nkosinathi Ndzimandze & Vusi Shabangu v. Ubombo Sugar Limited, case No. 475/05**. In that case the applicants were dismissed for theft of ten bags of the respondent's fertilizer. The bags in that case were recovered from the house of the 1<sup>st</sup> applicant. In the present case the five bags of fertilizer were not found in the possession of the applicant but in a spot in the forest that the applicant did not know about.

The applicant told the court that he was not given a fair hearing because he was prevented from cross-examining the witnesses, Thisj^s\_cjearJyjTolcpjr^^ both at the hearing stage and on appeal testified before court

and told the court that the applicant's rights to a fair hearing were observed. In any event, the applicant was represented during the hearings. It was not clear to the court why did he want to put questions to the witnesses himself as he was represented. During the appeal hearing the chairman allowed him to lead his witnesses. The court is satisfied from the evidence before it that fair procedure was followed during the hearing and on appeal.

[28] Taking into account all the foregoing observations and also all the circumstances of this case the court comes to the conclusion that the respondent has failed to prove on a balance of probabilities that the dismissal of the applicant was substantively fair. The court will

accordingly enter judgement in favour of the applicant.

**[29] Relief: -**

The applicant was first employed by the respondent in 1982. He was dismissed in November 2001. He had therefore been in the employ of the respondent for about nineteen years. The applicant told the court that he does not want to be re-instated. He was earning E810:00 per month. He is presently not employed. He has eleven children, nine of whom were still attending school. His wives are not employed. Taking into account all these factors the court will award him an equivalent of ten months' pay as compensation for the unfair dismissal.