



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 357/08**

In the matter between:

**REJOICE TSABEDZE**

Applicant

and

**MANSER IMPORT & EXPORT INVESTMENTS  
(PTY) LTD T/A MANZINI WASTE CENTRE**

Respondent

**Neutral citation:** *Rejoice Tsabedze v Manser Import & Export Investments (PTY) LTD T/A Manzini Waste Centre (357/08) [2016] SZIC 47 (October 04 2016)*

**Coram:** N. Nkonyane, J  
(Sitting with G. Ndzinisa and S. Mvubu)  
(Members of the Court)

**Heard submissions:** 20/09/2016

**Delivered judgement:** 04/10/2016

***Summary---Applicant dismissed by the Respondent on allegations of theft after some of the stolen items found at Applicant's house---Applicant charged with theft and admitted to bail---Applicant reporting for duty after payment of bail---Applicant turned away by the employer---Employer denying that it dismissed the Applicant and claiming that Applicant absconded.***

***Held---The employer's conduct of turning away the Applicant when she presented herself for resumption of her duties amounted to dismissal of the Applicant.***

***Held Further---No pre-dismissal hearing was held before the Applicant was dismissed. However much the employee may appear to be guilty, the employee is still entitled to pre-dismissal hearing and failure to hold such results in procedural unfairness.***

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## **JUDGEMENT**

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1. This is an application for determination of an unresolved dispute instituted by the Applicant against the Respondent in terms of Section 85 (2) of the Industrial Relations Act No.1 of 2000 as amended.
2. The Applicant is an adult Swazi adult of Malindza, in the Lubombo Region.

3. The Respondent is a company duly incorporated and registered in accordance with the company laws of the Kingdom of Swaziland with its principal place of business at Manzini City, in the Manzini Region.
4. According to the pleadings before the Court, the Applicant was employed by the Respondent on 07<sup>th</sup> June 2005 as a Shop Assistant. She was in continuous employment until 07<sup>th</sup> March 2007. The Applicant stated in her application that her services were terminated on 07<sup>th</sup> March 2007 on allegations that she had stolen soccer boots from the Respondent's storeroom at Matsapha. The Applicant stated further that she was not afforded a hearing prior to her dismissal. She also alleged that her dismissal by the Respondent was unreasonable and unfair, both substantively and procedurally.
5. The Applicant is accordingly claiming payment of *notice pay, leave pay, seven days wages, terminal benefits, maximum compensation and costs of suit.*
6. The Respondent is opposed to the Applicant's application. The Respondent denied that the dismissal of the Applicant was unreasonable and unfair. The Respondent stated that the Applicant and other employees were investigated following the disappearance of curtains, sportswear and other goods at the Respondent's shop. The Respondent stated that the curtains and clothing's were found in the Applicant's possession with the assistance of the police and charges were preferred against her. The Respondent stated further that after

the discovery of the missing goods the Applicant never returned to work.

7. Before the Court only two witnesses testified. It was the Applicant and the Respondent's Managing Director, Nokunceda Bujela – Manser.
8. The Applicant told the Court that she was employed by the Respondent on 07<sup>th</sup> June 2005 as a Shop Assistant. Her main duties were to sell goods to customers and the replenishing of stock. The new stock was kept at the Respondent's storeroom at Matsapha. The Applicant told the Court that one morning on 07<sup>th</sup> March 2007, she was called by the employer to the office. In the office she found three men who were introduced to her as police officers. Her employer, Nokunceda Bujela – Manser told her that they wanted to go and conduct a search at her house because there were soccer boots that had gone missing from the store room.
9. During the search, the police and the Applicant's employer took all the Applicant's clothes from the wardrobe and demanded receipt for the items. The Applicant said the clothes were not new. The items were put into a police van, and the Applicant was also taken to the police station in Manzini where she spent the night in the cells. On the following day in the morning she was taken to the Manzini Magistrate's Court. She was granted bail and was released on certain conditions. The Applicant said she was unable to resume work as the

employer told her “not to put her foot at the workplace” until she produced the receipts.

10. The Applicant said she went to report her plight to the Labour Offices in Manzini where she was attended by a Mavuso official. She said Mavuso telephonically contacted the employer but the employer refused to come to the Labour Offices. She said the employer never contacted her even though she knew where she stayed in Matsapha. The Applicant thereafter reported the matter with the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute remained unresolved and a certificate of unresolved dispute was issued. The Applicant told the Court that she attended remand hearings at the Magistrate’s Court for three years. Upon enquiry whether the trial will ever going to proceed, she was told that the file had gone missing. Up to this day, the trial has not yet commenced.
11. At the time of her arrest the Applicant had a two-months old baby who was at the day care centre. She was able to find the baby on the following day at the day care centre.
12. During cross examination, the Applicant told the Court that Nokunceda Bujela – Manser is her relative. She said they are cousins. She said whenever there was a need to replenish stock, the employees would go to the store house in Matsapha in the company of the employer. She said the store room keys were always kept by the employer. She said there was security officer at the door of the shop who searched people who were going out of the shop. The Applicant

denied that the employer took stock of the goods sold to balance with money received. She said stock taking exercise was carried out on new stock only. She also said she was not aware of any incidents of stock theft that occurred whilst she was still employed by the Respondent. The Applicant said on arrival at the Manzini Police Station, the employer told a certain Mthembu Police Officer to lock her up and that she did not want to see her again because she had stolen from her storeroom.

13. The Applicant told the Court that the employer accused her of having broken into the store room. She said the police and the employer took her skirts and dresses from her house during the search. She said they were also allowed to buy at the shop where they were employed.
14. During re-examination the Applicant told the Court that Nokunceda's mother is her grandmother. She said she went to the Labour Offices because the employer told her that she did not want to see her at the workplace when she returned after she had paid bail.
15. On behalf of the Respondent, RW1, Nokunceda Bujela – Manser told the Court that she established the business in 1989. She said she employed the Applicant because she felt she had a responsibility to the family as the Applicant was her blood – cousin. She said stock taking was done on a monthly basis. She said stock taking was normally done by the staff. She said during 2007 towards the end of February there was a stock taking exercise that was carried out after

which they realized that there were goods that were missing. The matter was reported to the police on 02<sup>nd</sup> March 2007. The police came to the shop on the 07<sup>th</sup> March at about 08:30 AM. On that day, the police, herself and the Applicant went to search for the missing items at the Applicant's house. She said they found goods that were bought from her shop and they put them aside. She said they also found the goods that were missing from the shop and asked the Applicant to produce receipts but she failed to do so. The goods were seized by the police and taken to the Manzini police station together with the Applicant.

16. She said the Applicant was arrested and a charge of theft was preferred against her. After appearing before the Magistrate's Court in Manzini, the Applicant was granted bail. RW1 said after the Applicant was out on bail, she came back to the shop. RW1 said she could not take her back because of the pending criminal case.
  
17. During cross-examination RW1 told the Court that they did not find the missing soccer boots at the Applicant's house, but they were found in the houses of the other shop assistants who were also investigated by the police. RW1 said they confiscated the goods found at the Applicant's house because she identified them as belonging to her shop and the Applicant failed to produce receipts. RW1 denied that the goods found were not new. She said the items were new and some

still had the price tags on them. RW1 said she never attended any Court hearing even though she was served with a subpoena. She said she referred the matter to the attorneys. RW1 also denied that she instructed a certain Mthembu police officer to lock up the Applicant because she had stolen from her shop. RW1 admitted that she did not pay the Applicant for the number of days worked before her arrest on 07<sup>th</sup> March 2007.

18. **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-**

The evidence revealed that the Applicant was employed on 07<sup>th</sup> June 2005 and ceased to work for the Respondent on 07<sup>th</sup> March 2007 when she was arrested by the police. She was therefore under the employment of the Respondent for one year and nine months. The calculation of terminal benefits is based on the number of completed years of service less one year. *In casu*, when the first full year of service is subtracted therefore it means that the Applicant was in the Respondent's employment for only nine months. The Applicant's attorney therefore correctly abandoned the claim for terminal benefits.

19. It was argued on behalf of the Respondent that the Applicant was never dismissed. It was argued that the onus of proof lay on the Applicant to prove on a balance of probabilities that she was dismissed by the Respondent. This is indeed the correct position of the law. ***Section 42 (1) of the Employment Act N0.5 of 198*** as amended states that,



*“In the presentation of any complaint under this Part the employee shall be required to prove that at the time his service was terminated that he was an employee to whom Section 35 applied.”*

Further, **John Grogan: Workplace Law 8<sup>th</sup> edition at page 120 stated the following:-**

*In dismissal proceedings, the onus is on the employee to prove that they were in fact dismissed, and on the employer to show that the dismissal was fair.....”*

It was therefore argued on behalf of the Respondent that the Applicant failed to demonstrate that indeed there was a dismissal or termination of the employer – employee relationship at the instance of the Respondent.

20. The Court does not agree with the Respondent’s attorney that there was no evidence that the Applicant was dismissed. The evidence revealed after Applicant was released on bail she did report for work but was turned away by the Respondent. The Respondent said she could not take the Applicant back as the criminal case was not over. During re-examination RW1 told the Court that she could not take the Applicant back because she found it impossible to re-hire someone who had stolen from her.

21. The evidence before the Court was clear that the Applicant presented herself to her employer but the employer prevented her from resuming her duties because of the pending criminal case.
  
22. The Applicant thereafter reported the matter to CMAC as a dispute. The dispute could not be resolved at CMAC. If the Respondent witness (RW1) was sincere that she did not dismiss the Applicant she could have simply revealed that at CMAC and the matter would have ended at that point and Applicant would have been required to return to work.
  
23. It was also argued in the alternative that even if it were found that the Applicant was dismissed, she is not entitled to any form of compensation by operation of the law as she is a blood relative of the employer as envisaged by Section 35 of the Employment Act. This section provides that;

*“Employee’s services not to be unfairly terminated.*

*35 (1) This section shall not apply to –*

*(a).....*

*(b).....*

*(c) An employee who is a member of the immediate family of the employer.*

(d).....”

The Respondent’s attorney did not allude to the definition of immediate family under the Act. In terms of Section 2, the definition section, immediate family,

*“means, in relation to a person such person’s father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister, wife, husband, common-law wife or common-law husband.”*

The definition section of the Employment Act does not include cousin as a member of the immediate family of the employer. The rules of interpretation of statutes are clear that the express mention of one thing means the express exclusion of the other. If the law makers intended to also include cousins, they would simply have done so.

24. The Court therefore will dismiss the Respondent’s argument that the Applicant is not entitled to any compensation because she was employed as a member of the employer’s immediate family.
25. The Applicant told the Court that the goods that were found at her place were not new and that they belonged to her. RW1, told the Court that there were new items that still had the price tags that were found at the Applicant’s house. The Respondent’s attorney implored

- the Court to make findings on the credibility, reliability of the witnesses and also the probabilities in deciding whose version to accept.
26. The Respondent's attorney, asked the Court to consider the Applicant's evidence relating to stock taking. The Applicant said stock taking was conducted only on new or arriving merchandise. RW1 told the Court that stock taking was done on new stock and also on old stock. The Respondent's attorney submitted that it was improbable that the Respondent could not take stock of the sold goods contrary to the established practice stock taking.
  27. The contradiction of a witness on one aspect of the evidence does not necessarily mean that the witness is not credit-worthy. The events of this case took place in 2007, about nine years ago. It is therefore highly likely that due to the passage of time the Applicant did not have a proper recollection of the events.
  28. The Respondent's attorney also sought to have the Applicant's evidence discredited on the issue of what happened during the arrest of the Applicant. The Applicant told the Court that RW1 told certain Mthembu police officer to lock her up. The Mthembu police officer was not called to deny that RW1 instructed him to "lock up" the Applicant. The Respondent's attorney further sought to have the Applicant discredited on her evidence relating to the status of the criminal matter at the Manzini Magistrate's Court. The Applicant told the Court that she was told by the Prosecutor that the docket was lost.

The Respondent's attorney submitted that since the exhibits have not been returned to the complainant (RW1), and RW1 has not been informed that the charges have been withdrawn; the Applicant's evidence was therefore fraught with factual inconsistencies and improbabilities.

29. The Court does not agree with the Respondent attorney's submissions. The Court does not agree that inconsistencies on peripheral aspects of the factual findings exercise should make the Court to come to the conclusion that the Applicant was not a credit worthy witness.
30. The main issue before the Court was whether the Applicant stole goods from her employer. RW1 told the Court that the missing items were recovered from the Applicant. The Applicant denied this and told the Court that the goods that were found at her house were hers and she denied that they were new items. The burden of proof was on the Respondent that the items found in the Applicant's house were the ones that went missing from the shop.
31. In her evidence in chief RW1 told the Court that she asked the Applicant to produce the receipts of the items but the Applicant failed to produce any. RW1 told the Court that the staff was advised that they should keep receipts of goods bought at the shop. This evidence was not challenged during cross examination. The evidence before the Court revealed that the stock take was done at the end of the month of February 2007. The search at the Applicant's house was carried out on the 07<sup>th</sup> March 2007, only a week later. If therefore

there was a rule at the workplace that staff should keep receipts of items that they purchased at the shop, the Applicant breached a workplace rule by failing to keep the receipts. The Respondent was not required to prove the theft of the goods by evidence beyond any reasonable doubt. The Respondent having realized that there were goods that were missing during the stock taking exercise at the end of February 2007, and some of the missing goods having been found in the Applicant's house a week later, the Applicant having failed to produce receipts in proof of purchase, the Court will come to the conclusion that the Respondent was able to prove on a preponderance of probabilities that the Applicant was involved in the theft of some of the goods.

32. There was evidence that after the Applicant had paid bail at the Magistrate's Court, she reported to work and her employer (RW1), turned her away. However guilty an accused employee may appear, that employee is still entitled to a pre-dismissal hearing. An accused employee is entitled to both substantive and procedural fairness. In the present application no charges were preferred against the Applicant, and consequently no disciplinary hearing was held. The dismissal of the Applicant was therefore procedurally unfair.

33. **RELIEF.**

The Applicant is currently unemployed. She was once employed three years after her dismissal. She told the Court that she stopped because she was afflicted by a certain sickness. She was in the

employment of the Respondent for only one year and nine months. Taking into account all these factors the Court will come to the conclusion that compensation equal to four months wages would be fair in the circumstances of the case. The Applicant partially succeeded in her claim against the Respondent. She will not therefore be granted the order for costs as claimed. The Court will grant an order that the Respondent pays only half the costs of suit.

34. The Court will therefore make the following order;
- a) The Respondent is to pay the sum of (E1,021 x 4) E4,084.00 as compensation for the procedurally unfair dismissal of the Applicant.
  - b) Wages for days worked E274.89
  - c) The Respondent is to pay half of the costs of suit of the Applicant.

35. The members are in agreement.

A handwritten signature in black ink, consisting of a circular mark containing the letters 'NN' followed by a stylized, cursive signature.

N.NKONYANE

**JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND**

**For Applicant:**

Mr. S. Zwane  
(Sikelela Zwane Attorneys)

**For Respondent:**

Mr. S.G. Simelane  
(Zonke Magagula & Company)