

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO. 19/85

In the matter of:

FRANK SHABANGU Applicant

VS

FRASERS SWAZILAND LIMITED Respondent

CORAM:

PRESEDENT J. A. HASSANALI

FOR APPLICANT: D. LUKHELE

FDR RESPONDENT: MR. DSCROFI

ASSESSORS: MESSRS B. STEPHEN & A. N. MATSEBULA

ISSUE IN DESPUTE: UNFAIR DISMISSAL

AWARD

(Delivered on 6-03-86)

HASSANALI, P.

In this matter, Frank Shabangu the applicant is claiming re-instatement, or in the alternative, compensation for his unfair dismissal together with terminal benefits.

Fraser: Swaziland Ltd., the Respondent Company is a well known retailer of merchandise in Swaziland, The said business was managed from its Head Office in Johannesburg, through its Group Manager stationed in Swaziland.

The Applicant joined the Respondent Company in 1953 as the Manager of its Thunzini Branch, Due to his excellent work in building up its business and achieving a record turn-over, he received a letter of congratulations (Ex.1) from the Head Office dated 9/6/65.

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I In 1967, he was promoted and transfered to the Vuvulane Branch as Manager, an establishment bigger than the branch at Thunzini. In 1978 he received another letter of promotion dated 11/5/78 (Ex. 2) transferring him to the Millsite Branch as its Manager. This letter reads as follows -Dear Frank,

I would like to congratulote you on your promotion to Manager of the Millsite Store as from 1st June, 1978,

I would also like to confirm that your salary has been increased from E440...00 to E600.

I must also confirm that your Incentive Commission Scheme which was set far Vuvulane Branch at the beginning of this year will continue to apply against the results produced by that store. up until the and of September this year. As from the 1st 15 October, 1978, of course a new Incentive Scheme will be set against your performance st Millsite Branch.

Once again congratulations and I wish you the very best of luck. I have every confidence that you will be able to Manage this big store very well indeed.

Yours sincerely

R. C. WILLIAMS MANAGING DIRECTOR

With his appointment as Manager, he and his family moved into a house allocated to him by the Company. His wife to worked there as on Accountant. During this period, one Hans Schroder arrived from Johannesburg to take up appointment as Manager of the Tshaneni Depot. He was allocated a two-bedroomed house, but felt that it was too small for his family which included himself

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his wife and a young child and so refused to move into it. Sometime later an, he and his wife made an unexpected call an the applicant st his house. Though he did not indicate any reason for this surprise visit, it appears that his intention was to see the house presumably with the idea of moving into it later on. Immediately after this visit, the Applicant received a letter from one Mr. Engela, the Group Manoger, deted 21/8/1 960, transferring him to the Tshaneni Depot to work under Schroder (ex. 4) This letter reads as fallows:-

Dear Frank,

RE: TRANSFER TO TSHANENI DEPOT

Please note the fallowing -

1. Stock will he token in Millsite on 25/a/80 which will be an official handover to the New Manager.
2. You will commence duties at the Depot and will work under the control of H. Schroder.
3. When the Industrial Depot is completed at Tshaneni, you will be appointed Manaqer of this Department.
4. Both you rand your wife will have to stay at Mhlume temporary until I can arrenge housing for you at Tshaneni.
5. The house you now occupy will be allocated to someone else, so please be ready to vacate these premises.

N. ENGELA

Group Manager

C.C. H. Schreder

H.C. Doke.

The Applicant states that he received this letter only after ho was removed from the Millsite Stores. His transfer was effected in such haste that the Company couldn't Find a

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suitable person to replace him. In the result it appointed one Bosnian Dlamini, one of it's drivers, who had no business knowledge nor managerial experience as the Branch manager.

The Applicant was thereafter allocated the same house which was originally given to Schroder, but he refused to shift when he found that it was too small to house a family of eight, and continued to remain at Millsite. Considering the circumstances under which he was transferred, the possibility is there, that this transfer could have been effected with the intention of giving the Applicant's house to Hans Schroder.

The letter of transfer failed to state in what capacity he was expected to work at Tshaneni, but it seems to me that he had been sent there to fill a position, much lower than the one he held at Millsite, although he would receive the same salary. Anyway it was a change of status for him. It should be noted that to take away certain duties may constitute a fundamental breach of contract, where the effect is to lessen job satisfaction and lower prestige. Being unhappy with the manner in which his transfer was effected, he wrote to the Head Office in Johannesburg on 1/9/1980 (Ex.16) setting out his grievances. Although he received a reply on 22/9/80 (Ex.16A) it seems to me that nothing further was done to enquire into, and redress his grievances. As a result the relationship between the Applicant and the company remained strained.

Despite this set-back, the Applicant continued to work at Tshaneni, though under degrading and humiliating conditions. He had no office to work in, nor was he given any staff to help him.

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His work place was a table placed under a tree, and all the loading and unloading of goods at the store had to be handled by him and his wife.

Mr. Louw who gave evidence for the Respondent Company stated that the Applicant was transferred to the Tshanani Branch because

- 1) He did not fit in as a team at Millsite.
- 2) His work performance had deteriorated.
- 3) He displayed a lack of interest in the business.

I find it hard to believe this in view of the Merit Certificate that had been awarded to him for exemplary Management, and various other letters of commendation. Furthermore Mr. Louw, during this period had never visited Swaziland and whatever report he received concerning the Applicant, was from Mr. Engela, the group Manager. Mr. Engela who was mainly responsible for the transfer of the Applicant and for the subsequent events that occurred thereafter was not called to give evidence and therefore I cannot place much reliance on this evidence.

I wish to mention here, that poor work performance could be a valid reason for transfer or sometimes for dismissal depending on the gravity of the offence, but it should not be exercised until the Management has given the employee a chance of improving himself by issuing a written letter of warning in order to bring about the desired progress in the worker's performance. Warnings are necessary because they give the employee an opportunity to change and improve. If the Applicant's work performance had deteriorated, he should have been served with a letter of warning in the 1st instance

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drawing his attention to his mistakes. Since there is no evidence to show this was done, I have some doubts as regards this allegation.

Furthermore the Applicant had served the Company faithfully for almost 19 years. Inevitably his length of service,

combined with his good work record and his loyalty to the Company are factors to consider in deciding

whether his dismissal has been fair.

When the Company failed to redress his grievances especially regarding his sudden and unexplained transfer to Tshaneni, he engaged the services of Mathse, Earnshaw and Malingn, a Firm of Attorneys to act on his behalf. They wrote to the Company requesting that he be re-transferred to the Millsite Store. It was also mentioned that there had been discrimination against local employees. (Ex. R"). Perhaps this upset the Company quite a bit and the already strained Employer-Employee relationship worsened.

Going through the evidence it seems to me that the Applicant had been deliberately and inequitably discriminated against racially, which constitutes a fundamental breach of contract and thus the conduct of the Employer was unlawful and imm. ral.

I have given very careful consideration to the mess of evidence placed before me and having regard to all the aspects of the case. I have no hesitation in concluding that on a just 25 and equitable assessment, the transfer of the Applicant from Millsite to Tahaneni was not justified.

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Despite the shabby treatment meted out to him, he worked h hard and developed the Industrial Site. On 23/3/82, he was again transferred to Vuvulans, a branch appreciably smaller than Millsite. However he was told that there was a likelihood of Vuvulane being developed into a Township and the branch being improved.

When Applicant assumed duties, there was no handing over of stock despite the fact that this Branch had been previously burgled. As a result he was not aware of the amount of stock the Branch hod, and what loss it had incurred.

The Company undertook to rent n house for him at Vuvulne Irrigated Farm but unfortunately there was no vacant one. They then enlarged a two bedroomed house by adding two extra rooms, but the Applicant found it still too small for his large family, and did not move into it. This seems to have further aggravated the already strained feelings between him and Mr. Venter, the New Group manager. Since then Mr. Venter Commenced to find fault with the Applicant's Management of the Branch. The Applicant has however denied any mismanagement on his part.

I am surprised that Mr, Venter was not called as a witness to substantiate his allegations. In the ciroumstances I do not wish to place much reliance on the quest inn of mismanagement. During this period, labour officers visited the Branch and the Company immediately suspected that the Applicant was responsible for their visit. The applicant however denied this.

It is in evidence that three days later Mr. Venter went to the store and demanded the keys from the Applicant, which he refused to give. Thereafter Mr. Venter had the padlocks cut

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and new lacks fixed, and the keys of which were handed over to one Simelane. At this sta e, Mr. Louw intervened in the dispute He asked the Applicant to write a letter of apology to Mr. Venter, but the Applicant refused to comply as he felt that he had done nothing wrong to apologise for. He was then paid his wages for November and December,1982 and his services were terminated On 16/12/82 he wrote a letter (Ex. R9) to the Head Office in Johannesburg stating his grievances, to which he received a reply (Ex. R10) on 28/1/83. The Company in their reply raised various matters but none of them we substantiated by proper evidence.

Messers. Engela and Venter who could hove helped the Court had they been called to give evidence, were for for some reason or other not called.

The dispute between the Applicant and the Respondent

Company stemmed from the unwarranted and unjustifiable transfer of the Applicant from Millsite to Tshaneni. In my view this; whole episode could have been amicably solved had the Head Office in Johannesburg intervened before matters got out of hand, and held a proper domestic inquiry.

It is necessary and advisable that when an Employer proposes to take action against an employee for misconduct, that after due notice to the employee, a domestic inquiry be held. Though such an Inquiry is not a legal requirement in Swaziland, it is always desirable, since the principle of natural justice

requires that a person must be informed of the charges against him and an opportunity be given to him to meet them. On Inquiry also establish the bona fide of the Employer, and dismissal

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without an Inquiry may sometimes be indicative that the Employer has acted arbitrarily. Since there had been no Inquiry, I have some doubts as to the bona fides of the Employer in this matter.

On the notice of termination, The Applicant has stated that he did not receive one personally. Evidence shows that a notice had been forwarded to the Applicant's lawyers which was handed over to him only in 1984. Even this notice was defective in that it did not state the name of the Applicant.

Therefore I hold that there was no notice of termination on the Applicant as envisaged under Sec. 33 (8) of the Employment Act No. 5 of 1980 .

Having taken into consideration the above facts, I have come to the following conclusions -

- 1) That the Applicant while employed at the Millsite Stores was suddenly transferred to the Tshaneni Depot, so that the Management could take over his house and hand it over to Hans Schroder. This act amounts to racial discrimination as envisaged under Sec.29 of the Employment Act No. 5 of 1980.
- 2) That the Applicant having assumed duties at Tshaneni, worked under degrading and humiliating conditions, in that his work place was a table set under a tree, and he and his wife performed the duties of labourers in that they themselves loaded and unloaded goods. The effect of this was to lessen job satisfaction and lower prestige. These in my view constitute a change of status amounting to a demotion.
- 3) That the Applicant was not provided with suitable accommodation either at Tshaneni or at Vuvulane, taking into

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consideration the size of his family.

4. That the failure of Mr. Engela and Mr. De Venter to give evidence has cast a certain amount of doubt on the question of the Applicant's work performance as alleged by the Management.
- 5) That the Company failed to issue him a written warning pinpointing his shortcomings,
- 6.) That when the Applicant had certain grievances against the local management, the Company did not think it necessary or important to look into them. Had an Inquiry been held. I'm sure an amicable solution could have been arrived at.
- 7.) That the Company failed to take into consideration the Applicant's long and clean service record when the question of his termination arose.
- 8) That the Notice sent to the Applicant was fatally defective and as such Section 33 (8) of the Employment Act had not been complied with.

Consequently I hold that the termination of the Applicant's services was unfair and make the following order. That the Respondent Company pay the Applicant

- a) E5,244 being six months compensation;
- b) E6,588.60 being severance Allowance one months' wages in lieu of Notice.

E5,244.00

E6,588.60

11,832.60

The Company will also pay the Applicant

- i) Contribution made to the Pension Fund.
- ii) Cash in lieu of leave, if any.

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I hereby direct the Commissioner of Labour to look into these two matters.

I make the above Order as an award of this Court. My Assessors, Messers B. Stephens and Matsebula agree with my decision.

Mr. Oscroft at the conclusion of the trial made an Application under Sec. 7 (2)(c) of the Industrial Relations Act No.4 of 1980. He has requested that in the event an award is made against the Respondent Company, that the Court stay execution of this award, pending the determination of the High Court case filed against the Applicant.

In my view Mr. Oscroft cannot invoke this section at this stage as the matter is still pending in another court - and therefore the question of a set off or adjustment does not arise. I think the Application at this stage is premature. In the circumstances the Application is refused.

J. A. HASSANALI

PRESIDENT