

IN THE INDUSTRIAL COURT OF SWAZILAND HELD AT MBABANE

CASE NO: 6/88

In the matter between:

JANE NTOMBI MAGONGO

Applicant

VS

FRAZERS (SWD) L.T.D.

Respondent

CORAM :

Hassanali President

Mr D Lukhele

for Applicant

Mr P Flynn

for Respondent

Messrs Mokgokong And Matsebula Assessors

AWARD Delivered on the 23/3/89

Hassanali, P

In this Application the applicant is claiming from the Respondent Company the following sums of monies for unfair termination -

a)	Additional Notice pay	E3 507.68
b)	Wages for 3 days	119.58
c)	Severance Allowance	8 769.20
d)	13th Cheque. December 1987 Bonus	950.00
e)	Overtime	1 704.61
f)	Stock taking overtime	6 288.32
		E21 339.3

The Respondent replied that the Applicant's termination was fair because -

- 1) the Applicant was involved in the running of a super market in Siteki while employed as the Manageress of the Respondent's super market, and that this constituted a conflict of interests. This was contrary to Respondents' business regulation and also amounted to a serious breach of the loyalty owed by the

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applicant to the Respondent.

- (2) Orders for Applicant's store in Siteki were being placed through Respondent's suppliers and these were being delivered and received at Respondents Store in Simunye. Respondent regarded the movement of goods in and out of its Store as a serious misconduct and breach of Respondent's* security regulations.

At the onset of the trial, Mr Flynn appearing for the Respondent Company withdrew his objections raised in limine after Mr Lukhele filed his amended application.

Mr Lukhele withdrew his claim for E 3 507.68 since it was discovered that this amount had already been paid to the Applicant by the Respondent.

Mr Lukhele also abandoned his claim on the 13th cheque amounting to E950.00.

The Respondent Company is a well known business establishment in Swaziland with branches in many parts of the country. The Applicant was recruited to this Company in early 1964 as a saleslady and in 1983 through sheer hard work rose to the position of Manageress of their branch in Simunye.

On 3/9/87 the Applicant was suspended from work on suspicion that she was running a business at Siteki. On 26/10/87 after a disciplinary inquiry (Ex. 'K') she was dismissed from Service (Ex. 'B')

The applicant in her evidence questioned the correctness of the contents of the Minutes (Ex.'K') more especially to the following, "Mrs Magongo further explained that the goods for the Store in Siteki were delivered at Fairways because she did not wish to cause suspicion by having the goods delivered at home." Since Ex. 'K' was an uncertified copy of the Minutes, it was

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the duty of the Respondent to produce the Minutes Book for the perusal of the Court in view of the Applicant's denial to some of the contents therein. In the circumstances I do not wish to place any degree of reliance on this copy (Ex.'K').

On the question of the disciplinary inquiry, I note that this Inquiry was conducted without first having given the Applicant the opportunity of preparing her case, and therefore I find that the principles of natural justice have not been complied with. I may mention that an employee's services should not be terminated without first charge sheeting her and giving her the opportunity of showing cause against the action contemplated against her.

I shall now deal with the salient facts in this case. On 3/11/87 the Respondent Company dismissed the Applicant on the ground that she was running a supermarket at Siteki. This the Applicant denied, both at the Disciplinary Inquiry and at the trial. It however transpired in evidence that none of the Respondent's witnesses had seen the applicant at any time in the said supermarket. Nonetheless the Respondent led evidence to establish the applicant's involvement in the said Supermarket through the following -

- (i) A writing (Ex.'F') by which the Applicant became the lessee of the premises where the said business was carried on.
- (ii) A letter addressed by the Accountant-General to the Applicant (Ex.'I')
- (iii) Invoices which related to purchases made by the Applicant (Exs. 'G', 'H')

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- (v) The evidence of Mr Thusi an employee of the Respondent Company to the effect that the Applicant placed orders for goods on many occasions.

The case for the Respondent Company depends largely on the documentary and oral evidence of the witness Thusi. The Respondent maintained that the writing Ex.'F' positively proved that the Applicant was the owner of the Supermarket. The applicant on the other hand agreed that the agreement was written in her favour but denied that she had anything to do with the business. She maintained that the shop belonged to her aunt Rebecca Shongwe who in her evidence strongly supported the applicant on this. She further said that the agreement was written in the applicant's favour as she had advanced her the money to operate the business. Rebecca made a good impression on me as a witness. At the end of her cross examination, her evidence remained totally unshaken and I find her to be a plausible witness. Therefore I accept the evidence of the applicant and Rebecca and hold that though the agreement was in favour of the applicant, the business was run by Rebecca.

As regards Ex. 'I' the Respondent took up the position that this letter written to the Applicant by the Accountant General was clear proof that she was the owner of the business at Siteki. The applicant however denied it and said that she could not understand as to why this letter was sent to her, Care of Egugu Grocery. Though this letter might suggest that the Applicant was the owner of Egugu Grocery, it is insufficient evidence to establish conclusively that such was the case. In my view the Respondent should have called one of the Revenue Inspectors who visited this shop, to give evidence as to how he concluded that the applicant was the owner. Therefore I do not

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wish to place any credence on Ex. 'I'

The Respondent produced the Hawkers Licence (Ex.'N') issued to the Applicant but this appears to have been issued prior to the commencement of the said business. As such this licence has no relevance to the business in question.

On the question of the invoices Exs. G, H, the Respondent tried to establish that the items listed in them were ordered by the Applicant through the Company supplies, for her shop at Siteki. The Applicant admitted to ordering them but denied that they were bought for the shop. She said that they were purchased for her own personal use and for the use of some of the employees in the Respondents' shop since the prices were cheaper than those sold in the shops in town. The purchases were not large and therefore it is reasonably possible that these items could have been purchased for herself and for the other employees since no evidence had been led to contradict it.

Robert Thusi a witness for the Respondent stated in his evidence that he was an employee of the Respondent Company. At the request of the Applicant he placed some orders on her behalf with the Company suppliers, and she personally took delivery and paid for them. He further stated that on one occasion when he placed an order on her behalf with the Representative for Mlangeni Foods, he refused to accept the order until the Trade Licence was produced. Thusi conveyed the message to the Applicant who then met the Representative. The Applicant however denied that she placed orders through Thusi and said that whatever Orders she placed, she did them personally. The Respondent did not produce any invoices in

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respect of these Orders nor were any witness called, especially the suppliers representatives, to substantiate the truth of Thusi's evidence. Had this been done it would have helped the Court immensely to arrive at a just decision in view of the fact that they would have been independent witnesses.

Another point for determination is whether this applicant has been breached the Company's security regulations. Mr Drake the Human Resources Manager of the Company maintained that the applicant had breached the Company's Regulation in that she kept the goods she purchased, in the Company's Store. This could be true but Mr Thusi their witness, had stated that sometimes when some of their other employees purchased goods from outside, they were kept in the Stores until taken in the evening. Therefore it appears to me that these Regulations were not being strictly enforced. In the circumstances it would be unfair and unjust to accuse her of this breach.

On the whole the evidence of the Applicant was satisfactory. She was subject to severe cross examination by Mr Flynn and I must say that her evidence remained unshaken.

Mr Flynn argued that if the evidence is taken in its entirety, it tends to reflect that the applicant was the

owner of the Egugu Grocery. Though some suspicion could be attached to her regarding her involvement in the said business, this I must say unhesitatingly is insufficient to come to the above conclusion. Therefore after very careful consideration of the evidence, I have come to the conclusion that the Applicant was not the owner of the Supermarket Egugu Grocery at Siteki and consequently I hold that the termination of the applicant is not justified.

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On the question of Relief, the Applicant is claiming the following -

Wages for 3 days	119.58
Severance Allowance	8 769.20
Overtime	7 992.93

The Applicant is claiming from the Company 3 days wages viz 1/11, 2/11 and 3/11 amounting to E119.58. Mr Flynn argued that the payment of one months salary to the applicant in lieu of notice included these 3 days. I am not in agreement with Mr Flynn on this. Since her suspension ended on 3/11 on her dismissal, one month's salary in lieu of notice should have been from 4/11/87 and not from 1/11. Therefore I am of the opinion that the applicant is entitled to the 3 days wages of E119.58

On the question of severance allowance there is no dispute as regards to the computation of this amount. I allow the application for the payment of severance allowance.

As regards overtime payment the applicant is claiming a sum of E7 992.93 from the Respondent Company. The Respondent denied liability to pay this amount on the ground that she belonged to the senior staff of the Company who were given enhanced salaries instead of overtime. Perusing Exs 'D' & 'E' I noticed that her claim runs as far back as 1983 and I cannot understand as to why she waited so long to make this claim. I have some doubts as regards this claim and I accept the Respondent's version that Staff Officers are not entitled to overtime payment. In the circumstances I reject this claim.

On the question of compensation I find that the Applicant has not claimed it in her application nor in her evidence.

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Therefore I have to decide whether I could grant her compensation for her unfair termination ex mero motu

Section 13 reads as follows -

- "(1) If the Court, in settling any dispute or grievance, finds that an employee has been dismissed or disciplined contrary to a collective agreement or to any law relating to employment, the Court shall make an order granting such remedy as it may deem just.
- (2) Without restricting the generality of subsection(1) the Court, in settling a dispute or grievance under this section may -
 - (a) order the employer to pay compensation to the employee or
 - (b) recommend the re-instatement of the employee in substitution for, or in addition to, any compensation it may order under paragraph (a)."

Reading the above I am of the view that the Court could order compensation ex mero Motu when it finds that a person has been unfairly terminated.

Therefore taking her long service with the Company and the circumstances under which she came to be terminated, I am of the view that an order for Maximum Confirmation would be just and equitable.

Consequently I order the Respondent Company to pay the Applicant the following -

3 Days Salary	119.58
Severance allowance	8 769.20
Compensation 6 months	5 700.00
	£14 588.78

My Assessors agree with my decision,

J .A. HASSANALI ,

PRESIDENT