

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO; 5/88

In the matter between:

JAMES J. MAGONGO

Applicant

VS.

FRASERS (SWAZILAND) LTD

Respondent

CORAM: HASSANALI J.A.

President

MR D. LUKHELE

for Applicant

MR P. FLYN

for Respondent

MESSRS MOKGOKONG & MATSEBULA Assessors  
AWARD

(Delivered on 6 - 4 - 1989)

HASSANALI, P

This Application springs from the dismissal of the Applicant by the Respondent Company on the ground of gross negligence. The Applicant has stated that he was unfairly dismissed but not as a result of gross negligence and proceeds to claim the following from the Company -

Salary for 3 days (Nove. 1987 270.00

Severance allowance 19 800.00

13th Cheque bonus 1 950.00

Overtime 6 515.04

Compensation 11 700.00

40 235.00

At the outset of the trial, Mr Flynn appearing for the Respondent Company withdrew his preliminary objection after Mr Lukhele, Counsel for the Applicant filed his amended application.

Mr Flynn submitted that he was restricting his case to one issue only namely miscalculation of Sales Tax.

At the end of the Applicant's case, it was noticed that the Applicant had failed to give evidence relating to his claims and Mr Lukhele applied to recall the applicant. Mr Flynn resisted the application but after listening to both Counsel, I allowed the application on the ground XXXX it would not in any way cause prejudice to the Respondent nor would it XXXXX in a miscarriage of justice since the Respondent was all along aware xxxx Applicant's claims.

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Mr Lukhele abandoned the claim for E1 950/= the 13th cheque bonus.

Frasers Swaziland Ltd, the Respondent Company is a well known retailer of Merchandise in Swaziland with branches in various parts of the country. The Applicant who was an employee of the company was suspended from work on 3/9/87 for the following reasons, pending a Disciplinary Inquiry

against him -

- 1) failure to notify of his wife's conflict of interest
- 2) Miscalculation of Sales Tax
- 3) Hold vouchers discrepancies (mishandling of Company money)
- 4) Incorrect payment of stock take bonus.

He was dismissed on 3/11/87 after a Disciplinary Inquiry.

The Applicant in the course of his evidence denied to some of the contents in Ex.A (Minutes of the meeting held in Swaziland on 26th October 1987) which was an unsigned copy of the minutes of the Inquiry. In view of the Applicant's denial, I submit that the Company ought to have produced the Minutes Book which Mr Drake a witness for the Respondent said, was available at the office. Its failure to do so, has cast some doubts in my mind as to the genuineness of the document (Ex.A) and I therefore do not wish to place much credence on it.

Though the Respondent Company conducted an Inquiry against the applicant, I am afraid that it was not done in a manner to conform to the principles of natural justice. The applicant was neither served before hand a copy of the charges preferred against him, nor was he given an opportunity to prepare for for the Inquiry. Instead he was straightaway

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summoned to the office where the Inquiry was held.

Before I proceed to set out the facts in this matter, I wish to briefly outline the procedure followed by the Company in relation to the preparation of Sales Tax Returns. The procedure being as follows - Each Branch of the Company forwards its details relating to Sales Tax to the Company's Head Quarters at Tshaneni. There the Clerk-in-Charge of the Sales Tax prepares a Return Correlating the figures with the invoices. Then it is submi-tted to the Group Accountant with the invoices. After satis-fying himself to its correctness the Accountant forwards a cheque for the amount reflected in the Return to the Swaziland Government.

According to the applicant he was recruited by the Respondent Company on 1/3/64 as a field accountant to do the stock audits of its Branches. He rose in the service of the Company after having gone through the vicissitudes of business intricacies and eventually ended his long career as Manager, Personnel and Training, from which position he was dismissed on 3/11/87, after nearly 24 years of service. At the time of his dismissal he was drawing a salary of E1950/= per month.

The Respondent Company denied that the Applicant was the Manager, Personnel & Training and maintained that he was the Company's Group Accountant. However the Respondent did not endeavour to produce any documentary evidence in support of this claim, but decided to rely on the oral evidence of one Mr Khumalo. According to him he succeeded the applicant as Group Accountant and took over from him the cash float.

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Unfortunately there is no evidence as to who maintained the accounts books and as to what happened to them. There is no evidence that it was the applicant who maintained the books or that he handed them over to Mr Khumalo. The applicant nonetheless tendered a letter dated 15/5/87 which purports to appoint him as the Company's Manager, Personnel & Training (Ex. E). This letter of appointment had not been cancelled nor was his appointment revoked. He nevertheless admitted that whilst he held this substantive post, he helped out the Company with some of its accounts more especially those relating to Sales Tax Returns. This was after the resignation of the Group Accountant,

Mr Littler. This is possible as Mr. Khumalo took over from the applicant only the cash float. Therefore in view of Ex. E and the evidence of the applicant, I think it is safe to assume that the applicant during the relevant period while holding the appointment of Manager, Personnel & Training helped the Company out with some of its accounts, especially relating to Sales Tax Returns. I find it hard to believe that a well known Company like Frazers would have entrusted its accounts to an unqualified and untrained person like the applicant.

Coming to the main issue in this case namely miscalculation of Sales Tax, I quote below Paragraph 4.1 of the Respondent's answer -

"The applicant has made serious miscalculations of the Respondent's Sales Tax Returns and in this regard an internal investigation by Respondent showed that an amount approximately E.107424.86 Sales Tax was due as a result of these miscalculation. It is submitted that this negligence on the part of Applicant has resulted inter alia in the following detrimental

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consequences to Respondent

(a) the Respondent is liable for interest and heavy penalties as a result of the failure to pay the said Sales Tax.

(b) The Applicant's action has brought the Company's good name and standing with the authorities into disrepute and in this regard the Respondent has been denied certain rail privileges which it had previously enjoyed."

From the above there seems to have been an internal investigation into the miscalculations of Sales Tax, presumably sometime before the suspension of applicant from duty, but sadly the Respondent did not think fit to place before Court as to when the investigation was held and whether the applicant was given an opportunity to submit his explanation on the Report. Therefore I assume that the Management had the Report on the investigation at least some time prior to the Applicant's suspension, but what I fail to understand is as to why the Respondent waited so long to suspend him.

Was his suspension connected in anyway with his wife's suspension? In this connection I wish to refer to Ex. A, Page 2 paragraph 3 re-Enquiry of Mr James Magongo, line 8 -

"Management explained to Mr Magongo that he had on several occasions attempted to get management to investigate certain members of staff who he believed were involved in business of their own. As a result, he knew very well what the consequences of such a breach were, yet he allowed his wife Mrs Jane Magongo to obtain a licence and trade at Siteki.

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Mr Magongo told the meeting that he knew nothing of his wife's involvement in the Siteki Store as she never told him and he is not involved."

From the above it seems to me that the Applicant's dismissal to some extent was connected with his wife's alleged involvement in a store at Siteki.

I shall now deal with the main issue namely the miscalculations of Sales Tax which led to the termination of the applicant's services, through the evidence of Mr Londlo Dlamini, a witness for the Respondent Company.

Londlo in his evidence stated that he was employed by the Respondent as a Sales Tax Clerk. His main duty was to prepare the monthly Sales Tax Return and submit it to the Applicant for his scrutiny.

The applicant then forwarded a cheque for the amount reflected in the Return to the Swaziland

Government. He further stated that Exs. H1 and H2 were prepared by the Receiving Clerk while H3, a summary of statement for January, 1987 by him. The Applicant had all these documents when he drew up the cheque for E5353.70 on H4. However he (Londlo) admitted that he erroneously entered in H3 against Tshaneni in column 3 E18266.42 and in column 4 E2504.20 instead of E182 , 644 .37 and E18944 .02 respectively. As a result of this error the Company underpaid the Government in the sum of E.16439.82. He realised his mistake only after the cheque had been posted. He also said that the underpayments due to his miscalculation continued for many months, Unfortunately the applicant was not cross examined on H1, H2 and H3 and therefore I have some doubts as to whether Exs. H1 and H2 were ever produced to him when he made out the cheque. It is also

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unfortunate that the Company did not lead sufficient evidence to establish the other underpayments.

Nonetheless the applicant admitted that he made out the cheque on the documents brought to him.

Therefore it is reasonably possible that the applicant may have had Ex. H3 when he made out the cheque and he should have detected the error. In the circumstances I hold that the applicant was responsible for the said underpayment. But it would be unjust to hold him wholly responsible for it when Londlo himself admitted to the fact that he was responsible for the error. As such Londlo was equally responsible for the underpayment. Had the Company appointed a qualified accountant in place of Mr Littler without entrusting the accounts to the applicant, all these discrepancies could have been avoided.

I now turn to another point. Londlo the Clerk in charge of Sales Tax of the Company, who admitted responsibility to the error in the Sales Tax Return for January 1987, is still employed by the Company, presumably in the same capacity and no charges have been preferred against him. Whereas the applicant who only went to the rescue of the Company after the sudden resignation of its group accountant faced the ultimate punishment of dismissal. This in my view is a clear case of discrimination by the employer.

At this stage I wish to refer to Ex. B which relates to the sales tax payments by the Respondent Company for the period September, 1984 to October, 1987. According to this, the miscalculations of sales tax, whether it was over payment or underpayment had been a common occurrence with the company all along and it appears that no action had been taken against

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those responsible. However I think that the main reason for the Applicant's dismissal was not on this issue but connected with his wife's alleged involvement with the business at Siteki .

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

(1) that the Disciplinary Inquiry was conducted without first charge sheeting the applicant and giving him an opportunity of showing cause against the action contemplated against him and thereby violating the principles of natural justice.

(2) that the applicant during the relevant period was the Manager Personnel and Training as per his letter of appointment dated 18/5/1987 (Ex.E) and not the Group Accountant as suggested by the Respondent. However the applicant at the request of the Company attended to some of its accounts especially those relating to Sales Tax Returns whilst holding the post of Manager Personnel S Training, after the resignation of the Group Accountant Mr Littler.

(3) That the Company conducted an internal investigation into the underpayment of taxes presumably some time prior to the suspension of the applicant. The applicant was neither questioned nor presented with the Report of the investigation with a view to obtaining an explanation from him.

Therefore his suspension and subsequent dismissal is unjust.

(4) that the applicant was not wholly responsible for the miscalculation of Sales Tax since Mr Londlo Dlamini himself admitted to the errors. Therefore Londlo is equally responsible for the underpayments

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together with the Management. It is hard to believe that a reputed company as Frasers should have neglected the appointment of a qualified accountant when Mr Littler resigned instead of seeking the services of the applicant.

(5) that Londlo Dlamini who is equally responsible for the underpayments of sales tax continues to work in the company in the same capacity, while the applicant has been dismissed. This in my view is an act of discrimination and should not be condoned in the interest of industrial peace,

(6) that the miscalculations of sales tax whether it was underpayment or overpayment during the period September, 1984 and October, 1987 had been a common occurrence and the Company for some reason or other had overlooked. Therefore it could be assumed that the Company may have overlooked this underpayment too had it not been for the applicant's wife's alleged involvement in the business at Siteki .

(7) that the termination of the Applicant is rather harsh and not in conformity with the principles of natural justice. In my view a written warning would have been just and equitable because -

(a) He had faithfully served the Company for nearly 24 years, with an unblemished record .

(b) He went to the rescue of the company when it was seriously in need of an Accountant.

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(c) He was not wholly responsible for the miscalculations and as such these could have been overlooked as all the others.

As you know warnings are important because they give the employee an opportunity to change and improve. Lord Denning in Retarded Children's Aid Society Ltd Vs Day 1978 ( RLR 128 at 130) said "it is good sense and reasonable that in the ordinary way for a first offence, you should not dismiss a man on the instant without any warnings or giving him a further chance."

Having very carefully considered the above I have reached the conclusion that the applicant has been unfairly terminated.

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

Salary for 3 days (Nov. 1987) 270.00

Severance allowance 19 800.00

Overtime 6 515.00

Compensation 11 700.00

38 285.00

The applicant is claiming from the Company 3 days salary viz 1/11, 2/11 and 3/11 amounting to E270.00. Mr Flynn took up the position that the one month's salary in lieu of notice included these 3 days. I am not in agreement with Mr Flynn on this In my view that since applicant's suspension ended on 3/11, on his dismissal, one month's salary in lieu of notice should have been from 4/11/87 and not from 1/11. Therefore the applicant is entitled to the 3 day's salary of E270.00

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Since there is no dispute regarding the computation of the severance allowance, I allow the application for the payment of this allowance.

As regards overtime payment the applicant is claiming a sum of E6515/= from the Respondent Company. The company has denied liability to pay this amount on the ground that he belonged to the senior management of the Company who were paid enhanced salaries instead of overtime. Perusing Ex.G, I find that his claims go as far back as 1980 and I fail to understand as to why he waited so long to claim this amount. I have some doubts as regards this claim and I accept the Respondent's version that staff officers are not entitled to any overtime payment. I reject this claim.

On the question of compensation, I am of the view that an order for maximum compensation would be just and equitable taking into consideration the circumstances under which he came to be dismissed from service.

Consequently I order the Respondent Company to pay the applicant the following -  
3 days salary (Nov. 1987) 270.00  
severance allowance 19 800.00  
compensation 1 1 700 .00  
31 770.00

I enter this as an award of this Court. My Assessors agree with my decision.

J.A. HASSANALI ,

PRESIDENT