

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 167/90

In the matter between:-

SIPHO ZUNGU

APPLICANT

and

BANK OF CREDIT AND COMMERCE INTERNATIONAL

(SWAZILAND) LIMITED

RESPONDENT

QUORUM.

M.S. BANDA

PRESIDENT

MR. V. DLAMINI

ASSESSOR

MR. I. YENDE

ASSESSOR

MR. DUNSEITH

FOR

APPLICANT

MR. FLYNN

FOR

RESPONDENT

JUDGEMENT

The Applicant in this matter is claiming compensation for his unlawful dismissal from his employment by the Respondent. The Applicants claim is made up as follows:-

- (1) A declaration that the dismissal of the Applicant by the Respondent was unfair.
- (2) An order reinstating the Applicant in the Respondents employ with effect from 9th April 1987.
- (3) An order directing the Respondent to pay the Applicant an amount equal to the remuneration Applicant would have been paid for the period April 1987 to November 1987.

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- (4) One months notice
- (5) Severance pay for each completed year of service.
- (6) Six months compensation

The Respondent in its reply denies that the dismissal was unlawful and claims that the Applicant committed an act of dishonesty against the Respondent and was entitled to dismiss him. The Respondent further averred that the Applicant was not entitled to the benefits claimed.

The background of this case is as follows: -

The Applicant was employed by the Respondent as a driver. During or about November 1987 the Applicant was dismissed by the Respondent with effect from 9th April 1987. On 9th April 1987 the Applicant was arrested on a charge of armed robbery and was acquitted of the charge during November 1987.

During the period April 1987 to November 1987 the Applicant was remanded in custody in respect of the said charge. After his acquittal Applicant returned to work and was advised by the Respondent that his services were terminated with effect from the day on which he was arrested and charged with armed robbery.

In a letter dated 8th April 1988 the Respondent confirmed that the Applicants services had been terminated pursuant to Section 36(b) of the Employment Act of 1980.

The Respondent averred that it reported the armed robbery to the police who laid the charge against the Applicant. The Respondent averred that there was evidence linking the Applicant to the robbery.

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The Respondent denied that it had dismissed the Applicant unfairly and averred that the Applicant committed an act of dishonesty against the Respondent and was entitled to dismiss him and that he is not entitled to the benefits claimed.

On the date of hearing it was submitted on behalf of the Applicant by way of an opening address that the Applicant was employed by the Respondent as a driver in 1979 and on 11th November 1987 he was dismissed. Applicant was arrested on a charge of armed robbery on the 9th April 1987. The arrest was effected on a mere suspicion of the Respondent that Applicant had been involved in the armed robbery. There was no cogent evidence against the Applicant and he was duly acquitted on the 10th November 1987 having spent the period from 9th April 1987 to 10th November 1987 in custody.

After acquittal the Applicant reported for work at the Respondents premises but was advised that he had been dismissed on the day of his arrest. The

Respondent confirmed on the 8th April 1988 that termination of Applicants services was effected in terms of Section 36 (b) of the Employment Act.

No disciplinary inquiry was held by the bank. He was never given an opportunity to respond to any accusations or any evidence which could incriminate him in the armed robbery in question.

Termination of services was unfair. The dismissal was procedurally unfair. Applicant was given a verbal dismissal backdated from November 1987 to 9th April 1987. The Applicant was not notified of the banks intention to dismiss him until 11th November 1987.

Applicants dismissal was summary. He was not paid any terminal benefits. Applicant is claiming remuneration for the period 9th April 1987 to 11th November 1987 pursuant to Section 39(3) of the Employment Act as he

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was entitled to the accrued remuneration . Applicant is claiming notice pay, additional notice, severance allowance and compensation in lieu of reinstatement.

The Applicant during the opening address amended his claim by the inclusion of additional notice and abandoning the prayer for reinstatement. The Applicant prays that the court make a recommendation for his reinstatement.

The Respondent in its opening address confirmed that the parties had agreed that the Applicant amend his prayer to include a prayer for additional notice. It was further submitted on behalf of the Respondent that the parties were agreed on the quantum appearing on paragraph 10 of the Applicants claim but disputed the legal liability.

It was submitted on behalf of the Respondent that it had reasonable ground to believe that the Applicant was involved in a dishonest act of armed robbery committed at the Respondents premises. Evidence will be lead to show participation of the Applicant. Respondent could not be expected to conduct an inquiry. Such an inquiry was unnecessary.

Applicant was acquitted on the criminal case but the circumstances will be proved on a balance of probability. Respondent was entitled to dismiss pursuant to Section 36 (b) of the Employment Act.

The Applicant testified in court in support of his claim. The Applicant stated he was formerly employed by the Bank of Credit and Commerce International (Swaziland) Ltd. He is married. He has 9 children. All the children are wholly dependent on his support. His wife has been responsible for his support and that of the children. She is shop assistant.

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He was employed around November 1979 by the Respondent.

During April 1987 he was still employed by BCCI as a driver. On the 9th April 1987 when he reported for duty the chief cashier instructed him to drive the Bank car to the basement. The Cashier stated that they were to load some money and drive it to the Central Bank. He followed the instruction. The money was loaded in the car. To accompany him were the Chief Cashier Mrs Dunn, Nkosinathi Dlamini and the Manager Mr. Barry.

He got into the car and the Chief Cashier told him to drive the motor car out of the basement. Present in the car was the Applicant, the Chief Cashier Mrs Dunn and Nkosinathi Dlamini.

The normal arrangement is that they load the money and drive out of the basement. The security guard closes the door of the basement. They drive out at the back of the bank and wait there for the manager who comes out through the back door and gets into the car to join them.

The place where they were parking was in the premises of the Respondent. It is next to the building of the bank. The only thing is that the public see them whilst in the car.

While they were sitting in the car waiting for the Manager the applicant was reading the Times of Swaziland and. discussing it with Mrs Dunn who was seated next to him. Nkosinathi Dlamini was at the back seat. The Applicant suddenly heard Mrs Dunn screaming next to him. When he looked at Mrs Dunn he saw a man in a dirty overall standing next to

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the car leaning on it pointing a revolver at them. The man had a cooper hat (a. hood) and he was wearing some spectacles. The man opened the door of the motor car and whispered for silence. He ordered them to come out of the car. He opened the door at Mrs Dunns side.

When Mrs Dunn was trying to get out of the car another man dressed in the same way jumped over the bonnet of the car fast to the Applicants side and pointed a revolver at the Applicant and ordered him to come out. The Applicant was very frightened. Applicant could not get close to him as he was calling the applicant to come out but instead the Applicant tried to creep back. This man then got into the car and held the Applicant on the neck with Applicants tie. He dragged the Applicant out onto the floor where Applicant lay helplessly and he put his foot on the neck of the Applicant and pointed the gun at the Applicant again placing it next to Applicants ear.

This man kicked the Applicant on the neck several times and once on the stomach and rolled the Applicant away. He further pointed at the Applicant with the revolver and whispered asking for the keys Applicant did not reply to him and he quickly ran into the car and what Applicant heard at that stage was the car being switched on. Applicant left the keys in the ignition. Applicant was still lying down when they

drove away and only noticed that the other man who had attacked Mrs Dunn mounted the car whilst on the move. Bank employees were taken out of the car and the robbers drove off with the money. This was not the first time that Applicant had driven out of the secured place. It was the normal procedure. The Applicant remembered the 9th April 1987 when they got up from where the criminals left them they ran back into the bank to report what had happened.

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When they reported this matter to management they instructed Applicant to drive another car with some of the Management. They tried to look for the criminals around town but did not see them. They then proceeded to the police station to report the incident. Applicant, Mrs Dunn and Nkosinathi were interrogated by the police. They were then released on the same day. They then went back to work. One day after they were released by the police. Applicant has forgotten the date. Applicant was coming for work at about 8:30 hours. When he approached the door of the bank some 6 police officers confronted him and asked who the driver of the bank was Applicant told them that he was the driver. He was subsequently arrested. He was handcuffed and taken to the police station. After approximately 4 days at the police station he was accused of being connected with the robbers. He was interrogated at length. Applicant was asked to confirm whether he was a priest. He confirmed that he is a priest because he is a priest.

The police told the Applicant that he was connected with the robbers and that he had already received his share and that he had been promised a kombi to convey his church members. Applicant denied the allegation. They then stripped him off his clothing and he was left naked. One police officer then started beating him up with a cable, another police officer had in his hand a pliers with which he pinched the Applicants testicals and the police told the applicant to give them the money. At this stage applicant was not handcuffed. They held him with their hands. He tried to fight his way out but he could not succeed. The violence was confined to the day he was first arrested. The interrogation lasted for a period of two weeks.

During interrogation the police wanted the Applicant to admit his connection with the robbers telling him that the robbers had already incriminated him that they were connected. Applicant continued denying because he was really not connected with the robbers.

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At one stage during the interrogation the Applicant was confronted by Manager Mr. Barry. This was 3 days from the day of the arrest of the Applicant. He asked for permission to have a word with the Applicant. He was given. The Manager asked the Applicant if he had any knowledge and connection with the robbery. The Applicant told him he did not have any knowledge or connection. The manager insisted in his question saying if the Applicant admitted he would consider reinstatement him back into his employment.

During the discussion with Mr. Barry they never touched any issue concerning Applicants employment position. Mr. Barry never told the Applicant of any suspension or expulsion or dismissal.

This was not the first time this issue of taking the Applicant back to work was raised. Even the police during the interrogation used to tell the Applicant that if he admitted the knowledge and connection with the robbery he would be taken back to work and the same words were used by the Manager when he went to see the Applicant at the police station.

The Applicant was held from the date of arrest until he appeared in the High Court. He was never released from custody by any bail. He was not released from custody during the trial by any means of bail.

On the first day of the trial the court released the Applicant on bail in his own recognisance. On the second time for the trial he was acquitted. Applicant was acquitted on the 10th November, 1987. He went back to work the following day after his acquittal and the Manager told him that he was dismissed on the

day on which he was arrested by the police.

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There was no reason given by the Manager for dismissing the Applicant even when he asked for the reason. The Manager told the Applicant he had no time for him and that if the Applicant wished he could even go to the King and tell him of his dismissal. There was no stage at which he was told of his dismissal. He did not received a letter of dismissal from the Respondent.

The Respondent did not tell him of any evidence to connect him with the robbery. He was never given any opportunity to reply to such accusations. There was no inquiry held by the bank. There was no truth that he was involved in the armed robbery which took place on the 9th April 1987. Applicant did not know that money would be conveyed until he was told by the Chief Cashier. Applicant testified that it was the policy of the bank that he would only know of the conveyance of money at the time when money was to be conveyed. He was not informed of the day dates and time. The day and time for conveying the money was not fixed. It could change from time to time.

Applicant worked around 8 or 9 days in the month of April 1987 prior to his arrest. He was not paid wages for the days worked. He did not receive wages for the period April 1987 to November 1987 when he was in custody. He was not paid any terminal benefits. He did not receive notice pay or severance allowance.

At the time of his arrest he was receiving E380.00 per month salary.

At the time of his dismissal he had completed 8 years of service. Applicant would like the court to declare his dismissal unfair. He prays that he be paid compensation of 6 months. He did not make any attempt to find alternative employment. The reason why he is not making any attempt to get another job is that if he gets employed by a new employer

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some references will be demanded and the Respondent will be the one to give his reference. They cannot make a good recommendation to such reference. He has not applied for any job. He is waiting for the matter pending before the Industrial Court to be over thereafter he shall start looking far a job.

Applicant is claiming terminal benefits being severance allowance amounting to 70 days. Notice pay of one month. 28th days additional notice. Salary from the 8th April 1987 to 11th November 1987. He is also praying for a recommendation that he be reinstated in the employment of the Respondent: If the Respondent does not accept the recommendation for his reinstatement he prays that he be paid 6 months compensation in lieu thereof.

Under cross examination the Applicant reiterated that he has not looked for alternative employment. He is waiting for the outcome of the matter before court. The Applicant testified that he cannot write English. Applicant further testified that because of his unemployment 6 of his children are out of school. Applicant testified that Mr. Barry's full name is Barry Farooqi. This is the man who saw him in custody.. Mr. Farooqi asked the Applicant if he was connected with the robbers. He made an offer. He said if Applicant admitted that he was connected with the robbers and that he gave them information about the conveyance of the money he would take him back to work and out of custody. Applicant told Mr. Farooqi that he was better in custody than to admit something he did not know in order to be out of custody.

Applicant denied under cross examination that at a meeting with Mr. Farooque at the Police station in Manzini he admitted meeting Moses Dube in February 1987 and telling Moses Dube that the cash in the bank leaves on a Monday and Thursday. Applicant denied telling Mr. Farooqi that he had been meeting Moses Dube at the bank on many occasions. Applicant denied

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telling Mr. Farooqi that he was sorry or that he was tempted by the offer of a Kombi. Applicant denied telling Mr. Farooqi that on the day of the robbery he told Moses Dube the direction from which the cash would be going out of the bank.

Applicant testified that immediately after his acquittal he went to see the bank . He saw Mr. Farooqi the one who had b seen him while in custody. He gave Mr. Farooqi a letter from the High Court stating that he was acquitted and told Mr, Farooqi that he had come back to work. Mr. Farooqi told the Applicant that his employment with the bank was terminated on the day he was apprehended by the police.

Applicant testified that he was employed by the Respondent in March 1979.

In re-examination the Applicant conceded that he can read Siswati but not English. He attained Standard One in education. He further testified that he reads Siswati with difficulty as he is not well in reading. The Applicant was shown exhibit D5 and asked to read the date at the bottom of the document. His reply was that he is unable to read it. The date he failed to read is 1/3/79. The Applicant testified that when he was at Manzini Police Station he spoke in siswati to Mr. Farooqi and the Police officers were translating the conversation.

This is the Applicants case. The Respondent lead the evidence of DW 1 Sub Inspector Solomon Maposa. The evidence of DW1 was lead but not concluded. He was not cross examined. He has since not returned to continue his testimony DW 1 commenced his testimony on the 13th June 1991. Matter was adjourned to the 30th July, 1991. On the 30th July 1991 the Applicant was present but the Respondent was not present. Matter was adjourned to the 1st August 1991. On the 1st August 1991 both parties were present the ma,tter was adjourned to the 3rd and 4th October

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1991 for continued trial. On the 3rd October 1991 trial was not conducted. Matter was adjourned to the 25th and 26th November, 1991 for continued cross examination of DW 1. On the 25th November 1991 DW 1 was not present. No other witness of the Respondent was present. Matter was adjourned to the 26th November 1991 for continued hearing. On the 26th November 1991 the Respondent was without witnesses. Matter was stood down from 10:18hours to11:02hours. At 11:02hours the Respondent still did not have any witnesses and applied for a postponement. The Applicant objected to the proposed postponement. The court dismissed the application for a postponement.

The parties then proceeded to make submissions. It was submitted on behalf of the Applicant that the only evidence before court is that of the Applicant. The witness for the Respondent was not cross examined therefore no weight should be attached to his evidence as it was not tested. The court has been left with the uncontradicted evidence of the Applicant his credibility as appears under cross examinatioonn. It has been submitted that the burden of proof rests on the Responndennt to justify the dismissal as being fair and for a good cause.

It has been submitted that the circumstannces of the robbery were not placed in issue. The Applicant described the practice ...at the Responndennt when large sums of money had to be transported. There areno facts to suggest that the Applicant participated in the robbery.

After his acquittal the Applicant reported for duty and was verbally informed that he was dismissed retrospectively to the date of his arrest. It has been submitted that this is an unfair procedure. No written notice of dismissal was ever given . The Applicant was informed of his dismissal on the 11th November, 1987. It has further been submitted that the Applicant

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was verbally dismissed annd that it was unfair and untenable in law. That the dismissal could not be backdated. That the employer must inform the employee that his contract is terminated. That the Applicant is entitled to his salary from April to 11th November 1987.

It has also been submitted that the Applicant is illiterate in English and can hardly read in Siswati and that he was embarrassed to admit this fact. Applicant cannot read. It is the Applicant's submission that it is incumbent upon the Respondent to prove that the Applicant committed a dishonest act in terms of Section 36.

It has finally been submitted that the Applicant should be paid his terminal benefits to include:

- (a) Severance allowance as set out in page 5 of his application
- (b) One months notice
- (c) Compensation of six times the Applicants salary

Applicant has further prayed that the court recommends his reinstatement and that if not accepted he should be compensated. It has been submitted that the Applicant was restrained from obtaining alternative employment. It has also been submitted that the actual dismissal of the Applicant was unfair, no inquiry was held, no evidence as to what were the reasons on which the Respondent dismissed him. That the Applicant has made out a case and the court should grant the relief as claimed in the application.

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This is the case before court. The evidence of the Applicant has not been contradicted by the Respondent. Applicant was cross examined at length by the Respondent but his evidence was not shaken in the material aspects. The Respondent in their reply have alleged that the Applicant was dismissed under the provisions of Section 36(b) of Employment Act. Respondent lead no evidence before court to discharge its burden under Section 42 (a) of the Employment Act. The evidence the court has is that of the Applicant. And as earlier stated the court is satisfied that the Applicant has discharged his burden of proof on a balance of probability.

No disciplinary inquiry was held by the Respondent nor was the Applicant ever given an opportunity to respond to any accusations or any evidence which could incriminate him in the armed robbery in question. The Applicant was given a verbal dismissal backdated from November 1987 to 9th April 1987.

He was not notified of the bank intention to dismiss him until the 11th November 1991. His dismissal was summary. It is the decision of the court that the Applicant was unfairly dismissed by the Respondent from his employment. It is ordered that the Respondent pay the Applicant his salary from 9th April 1987 to 11th November 1987 at the rate of E380.00 per month. It is ordered that the Applicant be paid one months notice and 28 days additional notice , it is ordered that the Applicant be paid severance allowance amounting to 70 days . Applicant testified that he is 38 years old. He is married and has 9 children wholly dependant on him. Because of being unemployed 6 of his children are out of school. He has not been able to secure an alternative job and has made no attempt to find alternative employment because the new employer will demand some references and the Respondent cannot a good recommendation to such reference. He is waiting for the matter to be determined before court.

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The circumstances surrounding the Applicants dismissal from employment are deplorable. It is ordered that the Applicant be paid compensation by the Respondent amounting to 6 times his monthly salary.

This is one case where there was no justification for dismissing the Applicant from employment. The court has recommended that the Applicant be reinstated in his employment with the Respondent. In default of such recommendation he be paid 6 times his monthly salary. The reference to payment of 6 times of the monthly salary in lieu of reinstatement is in addition to the 6 months compensation herein awarded to the Applicant.

This is a matter in which the Respondent have acted with deliberate delay in prosecuting their defence they are condemned in costs. The Applicant is awarded the costs of these proceedings.

The assessors concur.

MARTIN S. BANDA

INDUSTRIAL COURT PRESIDENT

9/12/91