

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 121/94

In the matter of :

GIDEON MAMBA Applicant

And

MHLUME SUGAR COMPANY Respondent

CORAM:

MARTIN BANDA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

LEO GAMA : FOR THE APPLICANT

ZWELI JELE : FOR THE RESPONDENT

JUDGEMENT

The Applicant seeks compensation for his unfair dismissal by the Respondent from his employment.

It is common cause that the Applicant was employed by the Respondent on the 1st March, 1972 as a head groundsman. He continued in such employment until the 31st January, 1994 when he was summarily dismissed. The Applicant gave evidence that Security Officers arrived at his office in the Parks and Gardens department. The Security Officers wanted to see the Applicant's Manager so that he could release the Applicant to them. The Manager was not in. Later on the Security Officers were able to see the Applicant's Manager and sought permission to take the Applicant away to his house for some radios which his children had taken from his neighbors in the compound.

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When they arrived at Applicant's place the Security Officers asked the Applicant to open all the houses. He complied with that and the search started but could not recover any radio. The Security Officers then saw the Applicant's tools, pick and some shovels. They asked for receipts showing ownership of the tools. The Applicant had some receipts. Some of the tools had no receipts, these included the tools which previously belonged to the Applicant's father. The search was conducted on the 11th January, 1994. They then went back to work. The following day when the Applicant reported for duty his colleagues told him that some Security Officers came again. They asked the Applicant to go with them to his home. The Applicant and the Security Officers went home together and on arrival they asked the Applicant to open the storeroom again. They then confiscated all the tools that they had seen on the previous day and took them to the Company Security Office at Mhlume. On arrival at Mhlume the Applicant was told to go home and come the following day so that the tools could be displayed for the employees to come and identify the tools. The following morning, employees came to see the tools but none were identified as belonging to them. The Security Officers asked the Applicant to produce receipts for the tools because they were suspecting that the Applicant had stolen the items. No report was made to the Police about stolen goods.

The goods were then separated by the Security Officers. The goods which looked new were placed together. The older ones were placed together. The new ones were then taken to the Royal Swaziland

Police Station by the Security Officers. The Applicant was also taken to the Police Station and the Police detained him. He was charged with being found in possession of stolen goods. The matter went to trial. The Applicant was acquitted as there was no evidence that the goods belonged to the Company. The Court released the goods to the Applicant.

The Applicant went back to his work place and on arrival was served with a letter of suspension. The Applicant was called to a hearing. He raised an objection that the disciplinary hearing could not proceed as the matter was pending before a Court of law. On the 21st January, 1994 the Applicant was called to the Office and served with a letter terminating his services. After the Applicant had raised the objection the inquiry did not proceed. After the Applicant's services were terminated no money was paid to him. He was earning E711.45 per month at the time of his dismissal. He is now claiming 6 months wages compensation in the sum of E4266.00, one month notice pay in the sum of E711.45, Additional notice pay in the sum of E2217.60 and severance allowance in the sum of E4266.00.

Under cross examination the Applicant stated that there were 5 spades, 5 shovels, 3 steel rakes, two dust bins, one hose pipe, 8 digging hoes, 3 axes, 4 ground brooms, 8 bush knives, two picks, 4 other straight picks, 4 slashers, 6 tins of paint, 3 bow saw blades, 2 drillers and 8 cane knives.

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The Applicant said as a Groundsman he had some employees who reported to him. He had equipment which the employees used in executing their duties under his control. The Applicant stated that he told the Security Officers that he bought the paint and it was given back to him. The paint had a company code stamp on it. The Applicant purchased it from the Company.

The Applicant stated that when the goods were placed for identification his Manager MR JAMESON NXUMALO came to identify them. The Applicant does not know if MR NXUMALO did identify any of the items as he did not do it in the presence of the Applicant. The Applicant stated that in the 22 years that he has worked for the Respondent they have never lost any item. They conducted stock taking every and MR. NXUMALO's Secretary conducted physical stock takes compiled the documents of the results and handed them over to MR. NXUMALO. The Applicant participated as a supervisor and would conduct physical stock take of the items and equipment under his control. The Applicant affirmed that on every occasion he had a hundred per cent stock presence.

The Applicant stated that on the 27th there was a disciplinary inquiry chaired by MR. ALEX MDLULI, the other members were MR. JAMESON NXUMALO and JOHN REILLY. MUSA SHONGWE who is a Steward and Secretary Clerk to MR. NXUMALO was also present. He was not representing the Applicant as the Applicant was not a member of the Union. At the meeting no statement was read. The inquiry wanted to discuss about the matter whose exhibits were before Court. The Applicant raised an objection and suggested that the matter should wait for the Magistrate Court results because one of the members of the disciplinary Committee was going to be a witness in the Magistrates Court during the Applicant's trial. The Applicant was not told what charge had been preferred against him. The Company's reaction to the Applicant's objection was to hand the Applicant a letter in which his services were terminated. The Applicant said he was never asked to plead to the charge MR. MDLULI was the Chairman asked MR. NXUMALO and MR REILLY if they had anything to say and they said they had none.

The Applicant said in the 22 years that he had been in service he knows nothing about a number of items which had disappeared in the Gardens and Parks department. The Applicant stated that the old tools were taken back to his home by the Company.

The Respondent lead the evidence of DW1 JAMESON NXUMALO a Section Manager of the grounds department. He knows the Applicant. He was his groundsman under his control. DW1 stated that he received a telephone call that the Applicant was wanted by Security department. He released the Applicant who went away for the whole day. The following day DW1 received another telephone call stating that the Applicant had been kept by Security Officers. DWI was eventually called to identify some items. DWI identified a wheelbarrow as one which had gone missing and they had reported that it was missing. DWI also identified a hose pipe which went missing from the clinic and it was

reported to security, he also identified gum boots, wooden handles for picks, hand gloves and rubber rakes. DW1 asked the Applicant how he got in possession of these items and was told that the gum boots and gloves were given to the Applicant by his brother in law.

DW1 was present when a disciplinary hearing was convened. The Field Manager MR REILLY presided. The Applicant was asked to explain how he was found in possession of items belonging to the Company. The Applicant was asked to respond to such allegations and to answer the charge but he declined to do so and he did not show any sign of interest in the matter. Eventually the Applicant told the disciplinary inquiry that he was not prepared to say anything in connection with the charges because as far as he was concerned he was still under Police custody or detention. DW1 took part in the decision to dismiss the Applicant from employment though he did not participate in the disciplinary inquiry because the Applicant did not show any respect to them as his Managers and refused to respond to the charges preferred against him.

DW1 conceded that there were monthly stock takes. The Applicant and the Clerk of DW1 would conduct physical stock takes and if there were items missing they would then come to DW1 and submit a list of missing items.

The Respondent then lead the evidence of DW2 MESHACK HLATSHWAYO an Assistant Security Officer. DW2 stated that on the 12th January, 1994 he received a report from his subordinates that there were some items at Applicant's home which were suspected to have been stolen from the Respondent. DW2 participated in the search of the Applicant's home where the following items were recovered; spades, forks, rakes, wheel barrows, hose pipes, cane cutters, gum boots, leather gloves, tins of paint, plastic dust bins and hack saw. These items were taken to the Respondent's premises at Mhlume. On the 13th January, 1994 the items were taken outside for the various departments to come and identify. DW2 said most of the items were identified by MR. NXUMALO in the presence of the Applicant. DW2 in the 5 years that he has worked in the security department he has received reports that items have gone missing from the Parks and Gardens department on several times.

Under cross examination DW2 said he was not called before the disciplinary inquiry. He did not give evidence to it. The Respondent then lead the evidence of DW3 ALEX MDUDUZI MDLULI the Respondent's Industrial Relations Manager. DW3 stated that in January, 1994 he received a report from the security department that various company property were discovered at the Applicant's kraal at Mpofu in Hhohho area. DW3 convened a disciplinary hearing which was chaired by MR. JOHN REILLY the Field Manager. DW3 stated that the Applicant was given the opportunity to give his side of the story. HE refused to give his side of the story. DW3 participated in the decision to terminate the Applicant's employment. The disciplinary inquiry decided that in view of the fact that some of the things had already been positively identified by company officials they were left with no option but to dismiss the Applicant. The other thing considered was that the Applicant had been given an opportunity to put his side of the story but declined to do so.

Under cross examination DW3 conceded that no one gave evidence before the disciplinary inquiry. Responding to questions from the Court, DW3 stated that the Applicant was verbally informed to come before an inquiry and that in terms of Company procedure he should have been written to. Responding to a question from the Counsel representing the Respondent DW3 stated that the disciplinary inquiry considered one statement from DW2.

We must say that it is rather odd for the Respondent to say monthly stock taking was conducting in the department of Parks and Gardens and reports of missing items submitted to DW1 yet fail to produce a single report. It is also odd for the Respondent to say several items were reported to the Security department as missing from the Applicant's department without handing to Court a single report of such loss. DW3 has clearly informed the Court that the Applicant was not given a written formal charge. DW3 has also sated that the disciplinary inquiry did not listen to any evidence from witnesses. DW1 stated that the Applicant had received a number of written warnings but made no effort to produce such written warnings before Court.

It was intimated on behalf of the Respondent that the Applicant was dismissed in terms of Section 36 of the Employment Act having been found guilty of dishonesty. No evidence was placed before Court showing on what basis the Applicant was so found guilty. There was no evidence before Court showing that the Respondent had lost any of its property. There was no report of loss of property from the Applicant's department. There was no evidence showing that the property allegedly lost if any was the one found with the Applicant.

There was no evidence showing that the Respondent held a disciplinary hearing. There was a sitting of a disciplinary Committee but it did not conduct any hearing, it did not deliberate on any evidence as none was presented before it. To make matters even worse the Applicant was never charged in writing by the Respondent for any alleged offenses against it. The Respondent has failed to show that it has discharged the burden of proof placed on it by Section 42 (2) (a) and Section 42 (2) (b) of the Employment Act as read with Section 36 (b) of the Employment Act.

It is our decision and we so hold that the Respondent unfairly terminated the Services of the Applicant without cause or justification and that at the time of such termination the Respondent did not take all circumstances surrounding the case and decide that it was reasonable to terminate the services of the Applicant.

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We order that the Respondent do pay the Applicant the following terminal benefits :

- (a) One months notice E 711.00
- (b) Additional Notice E2217.60
- (c) Severance Allowance E4266.00

On compensation we are satisfied that the Applicant has complied with Section 13 (3) of the Industrial Relations Act. It is ordered that the Respondent do pay to the Applicant 6 months salary by way of compensation in the sum of E4266.00.

The members have concurred.

MARTIN samson banda

President - industrial court