IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 206/98

In the matter between:

HEZEKIEL SOKO	APPLICANT
And	
SWAZI PAPER MILLS	RESPONDENT

CORAM:

NDERI NDUMA	: PRESIDENT
JOSIAH YENDE	: MEMBER
NICHOLAS MANANA	: MEMBER
FOR THE APPLICANT	: MR. ALEX SHABANGU
FOR THE RESPONDENT	: MR. MUSA SIBANDZE

JUDGEMENT

(23. 09. 99)

The Applicant was employed as a driver/Fireman for a period of three years and nine months commencing on the 10th July, 1993 until the 2nd April 1997 when he was dismissed. The dismissal was pursuant to a disciplinary hearing that found him guilty of negligent and reckless driving of a company motor vehicle (an ambulance) whereby he lost control of the vehicle and crashed into a tree along a private driveway leading to the Respondent's mills. The accident is alleged to have occurred on the 3rd March, 1997 at about 1555 hours.

The Applicant alleges that the dismissal was unfair in the circumstances of the case since he had no previous record or written warning for negligent or reckless driving and that he was at the time of the accident driving between 60 - 80 kph which speed he deems reasonable because he had express instructions from his foreman Mr. Mndzebele to rush to the homestead of a sick employee by the name of Mgodloli and bring him to the Respondent's clinic to be attended by the resident nurse before her knock off time at 4.30p.m.

The Applicant told the court that dogs suddenly emerged from the side of the driveway causing him to apply emergency brakes. As a result the motor vehicle skidded on the wet tarmac, he lost control of it and it hit a tree on the right side of the driveway approximately thirty paces from the point where he applied the brakes as one drives away from the mills.

The court visited the scene of accident for an inspection in loco and made the following observations :

(i) The road was reasonably straight from the point where the Applicant applied brakes to the point of impact,
(ii) That there were scattered trees on either side of the driveway,
(iii) The road was well tarred,
(iv) The point of impact was approximately one kilometre from the Respondent's factory,
(v) The driveway had a gentle curve to the right at the point where the Applicant alleged to

have applied the brakes after noticing the dogs on the road.

The Applicant admitted that the road was wet though visibility was clear at the time of the accident as the rain had stopped falling. It was put to him by the Respondent's Attorney that it was unreasonable for him to approach the bend at a speed of between 60-80 kph when the road was wet. He replied that even though it was wet, he had to drive fast as it was an emergency for he had to bring the patient to the clinic before 4,30p.m. When pressed further the Applicant agreed, however that it was not reasonable to drive at that speed when the road was wet except that in this case it was an emergency. It was not disputed by the Applicant that the accident occurred at about 2.55p.m. more than one and a half hours to 4.30p.m. yet the patients homestead was not far from the Respondent's mill.

It was denied by the Respondent that the Applicant had any instruction to over speed or rush as this was not an emergency situation. The patient had been injured the day before and he was being brought to the clinic for a routine check, the Respondent averred

We were shown the photographs of the motor vehicle taken after the accident and it had been extremely damaged. It is not disputed that the motor vehicle was written off by its insurers after the extent of the damage was assessed to be E26,000.00 hence it was uneconomical to repair the motor vehicle and retain it.

The Applicant on the contrary sought to apportion the damage to the motor vehicle to a previous accident. He said the windscreen was broken, the bonnet was not lockable and they had to use a wire to tie it down. Also the front grill was not there. The head lights were not fully functional hence they could not use the motor vehicle at night.

Although these allegations were denied by the Respondent, it is clear to us that the motor vehicle had certain pre-accident defects, however, non of these have been said to have in anyway contributed to the accident save for the brakes which the Applicant told the court were malfunctioning to the extent that he had to apply the brakes twice for the motor vehicle to stop.

It was put to him that if the brakes were not effective the motor vehicle would not have skidded in the manner he alleges it did but he would have ran into the dogs instead. He denied this assertion by the Respondent but we observe that the version put by the Respondent was more plausible if the brakes were not working. The Applicant had told the court that he had reported

the brakes failure the morning of the accident and this had been recorded in the daily occurrence book in the morning of the accident.

The occurrence book was produced as an exhibit and such record was not seen thereof. The Applicant further agreed that since he transported patients, he should have been more careful as a driver but he said that an accident may happen at any time.

The Applicant was found guilty of the offence of negligent and reckless driving by a disciplinary committee. The records of the inquiry shows that he had no previous records of careless, negligent or reckless driving. He lodged an appeal challenging the procedures followed in the inquiry and stated that the sentence was too harsh in the circumstances of the case.

The Applicant prayed for reinstatement to his job even if simply as fireman without having to drive a motor vehicle. Though the Applicant had no written warning on his personal driving record, he could recall his superior Mr. Mndzebele having given the drivers a general warning to stop over speeding and that at one time, while he was transporting Mr. Mndzebele to Manzini, he was chastised for over speeding but he denied that he was driving at a speed of 140 kph on that ocassion as was alleged by Mr. Mndzebele.
In his testimony for the Respondent Mr. Linda Mndzebele denied that the motor vehicle driven by the Applicant had malfunctioning brakes. He emphasised that all reported defects to company vehicles are recorded in the occurrence book. We were able to observe such reports in the occurrence book that was produced by him but there was no report of defective brakes on the 3rd March 1997, the date

of the accident as was alleged by the Applicant. Indeed the occurrence book reflected a report by a Mr. Sabelo Mkhatshwa regarding the same motor vehicle on the 2rd March 1997. The Report was for a defective left mirror. This report was corroborated by the Applicant himself.

Mr. Mndzebele told the court that he sent the Applicant to pick up the patient. That even if he had told the Applicant to hurry up that did not mean that he should drive beyond road traffic limits in Swaziland which was then a maximum of 80 kph on a highway.

He said further that, though the Applicant had no written warnings on his driving he had verbally cautioned him regularly to stop over speeding.

Mr. Mndzebele charged the Applicant for negligent and reckless driving because he concluded that over speeding was the cause of the accident upon an analysis of the scene. It did not matter that he was avoiding dogs, as he should have been able to stop safely, had he been driving at a reasonable speed, the witness told the court,
Mr. Mndzebele further testified that the Applicant should not be reinstated to his job, because he is a habitual fast driver, and since the Respondent cannot trust him with its motor vehicles, they would have to retrain him afresh.

We were referred to the disciplinary code in the Recognition Agreement between the Respondent and the Applicant's union at the undertaking.

Offence Number twelve (12) thereof is categorised as:

"12 Gross negligence, whereby an employee causes barm to the company through gross neglect to the duties and responsibilities of his/her job- first offence - instant dismissal".
Though it was submitted that this punishment was applicable to the offence committed by the Applicant, the Applicant was not specifically charged of gross negligence nor was there a specific finding that he was guilty of gross negligence.

The Applicant ought to have been specifically notified of the offence No. 12 in the disciplinary code and the consequences that would befall him if he was found guilty. There is no evidence that this was done.

Though the charge sheet that was availed the court reads that the Applicant was charged for negligence and reckless driving, we note that the applicant should have been found guilty either of negligent driving or reckless driving but not both. Recklessness constitutes gross negligence. We do not know what the actual findings of the inquiry was.

This however, in our view did not negate the proceedings. We are satisfied with the evidence of Mr. Mndzebele as regards the manner the enquiry was conducted.

We are further satisfied that in the circumstances of this case there was evidence of gross negligence on the part of the Applicant. He admits himself that he should not have driven in the manner he did given the fact that the road was wet. We are not satisfied with his explanation that seeks to justify the speed at which he drove. Indeed we do agree with Mr. Mndzebele that the Applicant was not given specific instructions to over speed. He did that by choice and should face consequences of his actions.

According to the agreed standards as stipulated in the disciplinary code at the Respondent's undertaking, an employee who damages company property through gross negligence is liable to dismissal for the first offence.

As was observed in the case of SA Commercial Catering and Allied Workers Union & Another v Edgars Group of Companies (1993) 2 LCD 91 (I J) :

"An employer is entitled to set reasonable standards to which an. employee must comply ".

In this case the Respondent and the Applicant's union had entered into an agreement stating the standard to be maintained by employees as regards negligent conduct and the consequences for failing to do so.

This court would be slow to interfere with a decision of the Respondent which in our view is based on reasonable standards of expectation from its employees which standards were agreed upon between the parties to the Recognition Agreement.

It was argued for the Applicant that the Respondent's failure to fit its reason for dismissal in any of the specific pigeon holes of Section 36 of the Employment Act, makes the dismissal contrary to the law and therefor unfair.

In the letter of dismissal the Respondent cited Section 36 (d) as the reason for termination, that is ;

"(d) because the employee either by impudence or carelessness endangers the safety of the undertaking or any person employed or resident therein ".

This was said to have been an oversight on the part of the Respondent in its reply and that the dismissal was infact pursuant to Section 36 (j) which states ;

" for any reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section ".

It is our considered view following the decision of Judge Parker in Oscar Z. Mamba and Swaziland Development and Savings Bank Swaziland (I C) Case No. 8l/96 that an employer may dismiss an employee for negligence and dereliction of duty in terms of Section 36 (d) and (j).

We hold in the circumstances that the Respondent satisfied the requirements of Section 42 (2) (a) and (b) of the Act. Gross negligence resulting to substantial loss to the company is a reasonable cause for an employer to terminate the services of an employee in terms of Section 36 (d) and (j) of the Employment Act.

The Applicant's Application is dismissed accordingly with no order as to costs. The Members concur.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT