

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 212/98

In the matter between:

YUSUF THEMBA VILAKATI

APPLICANT

and

ELLERINES FURNITURE T/A

TOWN TALK

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR ALEX SHABANGU

FOR THE RESPONDENT:

MR. MUSA SIBANDZE

JUDGEMENT

10/11/2000

The Applicant seeks reinstatement to his job as Branch Manager with all benefits including arrear salary from June 1997 and in the alternative compensation for unfair dismissal and payment of terminal benefits itemised in the particulars of claim.

It is common cause that the applicant was an employee to whom Section 35 of the Employment Act No. 5 of 1980 applied having been employed on the 2nd April, 1984 and was in continuous employment with the Respondent until the month of June, 1997 when he was summarily dismissed for alleged poor work performance.

As at the date of his dismissal, he was earning a monthly salary of E7,300 having served the Respondent in various branches for a period of thirteen years.

It was his case that at various times during the subsistence of the contract of employment, his work performance was approved and recognised by the respondent as deserving meritorious recognition as is evidenced by exhibits 'AT and 'A2'. 'AT being a certificate in recognition of five (5) years of meritorious and loyal service awarded on 30th June 1989 and 'A2' being a similar certificate awarded to the Applicant on 30th June, 1994 by the Chairman and Managing Director of the Respondent Mr. Eric Ellerine.

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Annexure "A3' was a letter dated 14th May 1997 addressed to the Applicant in his capacity as the Branch Manager Town Talk Furnishers, Manzini by the Managing Director Mr. Eric Ellerine. This letter is of such significance to this matter as to warrant a verbatim reproduction herein as follows;

"14th May, 1997 YUSUF VILAKAZI TOWN TALK MANZINI MANZINI Dear Yusuf EXCELLENT

You have completed yet another M. B. O. period without losing any staff from your store. I am very pleased to be writing to you for the second time to congratulate you on achieving excellent staff stability.

Your own success as Manager, as well as the success of your store, ultimately depend on your ability to work with your staff, to command respect, to gain credibility among them, to guide and assist them, to lead by example. Those are the things which motivate your people. That is why the credo of our Company is "our Success is People". You are certainly proving this point.

To me, the stability of your staff shows your commitment to the Company credo. To assist you further, I would like to give you three basic principles of staff motivation which you can apply;

1. member of staff must believe that their specific function makes a valuable contribution to the overall success of your store. So, give them confidence in their work.
2. Each member of staff needs to know that you value him/her as part of your TEAM. So, give them confidence in their importance as individuals.
3. Your team must believe that you depend on them to make "their" store successful. So, help them think like a team and work as a team. Like this you will give them confidence in their importance as a team.

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Your management style is evidently successful, and I am confident in your abilities to achieve even greater success in the future. However, if you add these principles, I am certain you can go even further than that,

I congratulate you. Keep up the good work. Sincerely,

ERIC ELLERINE".

Hardly two months after this unreserved commendation by the chairman and the Managing Director of the Respondent, the Applicant was dismissed for poor work performance.

He reported a dispute to the Labour Commissioner, the same was not resolved and a certificate of unresolved dispute was issued thereof.

It is also of note that for the year 1994/95 the Applicant had received "highest average per field Rep" sales award in respect of Town Talk Manzini.

The Respondent's case as outlined in its response to the request for further particulars is that the Applicant was dismissed for a proper reason in that his work performance was poor because:

8.1.1 He failed to comply with cashing up procedures during the period 20th May 1997 to the 25th May 1997 by not signing the receipt book of accounts inspectors on daily basis resulting in the accounts inspectors rolling cash to the amount of E3,712.00.

8.1.2 He further failed to comply with cashing up procedures by not signing off manual receipt and batch listings so as to verify that money collected was kept in the correct account number.

8.1.4 On or about the 26th October 1996 Applicant received from a customers account a personal cheque to the value of E800.00 which he accepted for payment of goods without clearing the cheque with the issuing Bank. Subsequently, resulting in the fact that payment of the cheque was denied by the Bank thereby causing a loss of E4,688,00 to the Respondent; and

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8.1.6 Applicant further failed to rectify the specific weaknesses highlighted in the Audit report after being trained by the Regional Internal Auditor with specific reference to banking, capturing of cheques daily, cash cheques, amongst other things, despite written warning, counselling and training.

According to RW2 Mr. Chris Bock, the Applicant was served with a written warning in respect of various aspects of his work.

The Applicant was asked to address all the areas of concern. The Applicant denied having received this warning at all recalling that the only one he had received was in February 1996 and not 1997. The Applicant nonetheless accepted that the signature on the warning was his.

Of significance is that the warning was closely followed by the accolade offered the Applicant by the highest authority in the Respondent's undertaking in May 1997.

On the 9th May, 1997 the Respondent's Internal Auditor Mr. Barney Klein outlined several faults in the Town Talk Manzini operations in exhibit "R2".

Mr. Bock told the court that during the end of May, following Mr. Klein's, audit, the areas of complaint had not been attended to. He accused the Applicant of failure to fill in the details of the branch banking transactions on a daily basis as he was supposed to particularly for the period 12th May 1997 to 22nd May 1997. It is common cause he had been counselled on the 12th May 1997 on this issue.

The Applicant's explanation that the Banking register was misplaced on the days referred to was said to be simply untrue by Mr. Bock as it was a vital document whose loss should have been reported to him as an Area Manager.

It was submitted by the Respondent that failure by the Applicant to respond to counselling had meant that the Respondent "could no longer afford to keep a person in the Applicant's position without risking the viability of the business".

As regards the mailing list, the court was told that the Applicant had an obligation to capture 340 names in the mailing list by 25th May 1997. Mr. Bock told the court that upon checking the mailing list on 5th June, 1997 the Applicant had fallen far short of the required target as there were only 165 names therein. The Applicant denied this allegation stating that he had maintained the required number in the mailing list but the computer register automatically deleted names from the list an issue that was contested by Mr. Bock.

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The Applicant had according to evidence of Mr. Bock an obligation to receipt money from the collectors as a control measure to prevent fraud or money "rolling by accounts inspectors who went to the field to collect money from customers". The Applicant had to do this on a daily basis. On the 20th May 1997 to 24th May 1997 the Applicant did not check on the Accounts Inspector Vincent Ndzimandze and did not sign off the accounts inspector receipt book daily on those occasions.

The Applicant explained to court that Vincent had avoided him during the period and infact he had planned on instituting disciplinary action against him prior to his dismissal.

It came out under cross examination that the Inspector came daily to the shop to fill up his motor vehicle with fuel and the Applicant had seen him severally during the material period.

On the occasions the Inspector came to fuel, the Applicant explained to the court that he would arrive around the closing time and he did not want to leave cash in the shop to avoid risk of robbery.

The Accounts inspector was subjected to a disciplinary action by the Respondent for rolling over cash. He was dismissed and reinstated upon appeal subject to a final written warning. The overall blame was placed on the Applicant as the Manager of the branch.

The Applicant was further accused of failure to check and sign batch listings on a daily basis. This covered the period 25th May, 1999 and 26th May, 1999.

Though these may be different minor omissions, the Respondent submitted that all the failures of the Applicant taken in totality were sufficient to constitute a reasonable cause for dismissal especially considering the failure to keep a proper bank register and to support cash cheques.

According to the Respondent, the ultimate failure by the Applicant was the breach of clearing procedures pertaining to a cheque for E800.00 paid in as a deposit on 26th October, 1996 for a purchase transaction in the tune of E4,468.00.

It was alleged that the Applicant accepted such deposit and authorised the transaction to proceed before the cheque had been cleared by the Bank to indicate whether the cheque would be honoured or not.

"R10" a page of the management manual dealing with handling of cheques was handed in. This document however covered the acceptance of third party cheques other than a customer of the Respondent. To this extent, the same was not strictly applicable to customer transactions.

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The Applicant denies any personal involvement with this particular transaction stating that he was away on a seminar on the material day. The Respondent refuted his assertions.

The transaction according to the evidence available was also approved by Mr. Bock the Regional Manager who told the court that he entirely relied on the information provided by the Branch Manager.

The transaction had taken place on the 26th October 1996 and the Applicant was charged for its commission in mid 1997. The Applicant contends that this was unacceptable delay, if there was any substance in the allegations levelled against him. In response the respondent contends that they had given the Applicant time to redeem himself hence the delay. The Respondent in particular wanted to establish whether the goods could be recovered or not.

The Respondent argues that the dismissal of the Applicant for poor work performance was in all circumstances of the case reasonable because of the seniority of his position as Manager of the branch, his obligation to ensure that policies and procedures were maintained and the fact that the areas of incompetence included the handling of the banking register an extremely important part of the Applicant's duties hence it was not reasonable to expect the Respondent to continue to employ the Applicant.

On the contrary, the Applicant contends that the Respondent had dismally failed to discharge its onus in terms of Section 42 (2) (a) and (b).

Regarding the complaint of failure to sign batches, the Accounts Inspector failed to bring receipt book on two occasions and on the third day the Inspector alleged he had misplaced the receipt book. When the Applicant was contemplating taking disciplinary action against the Accounts Inspector he found that he had already been dismissed. This was done by Mr. Bock without liaising with the Applicant.

It is the Applicant's contention that he had no reason to mistrust the particular Accounts Inspector since he had dealt with him for a considerable period of time without incurring any loss of collected cash.

Upon consideration of the evidence available pertaining to this offence, we do find that Mr. Bock acted hastily and in a high handed manner. It would appear that he was in considerate of the authority of the Applicant and his track record as a Manager of the Respondent for a lengthy period. To this extent, the culpability of the Applicant has not been established on a balance of probabilities especially taking into account his good track record as a Branch Manager. It would appear there were no hard and first rules in the manner the Branch Managers dealt with their Accounts Inspectors. No policy document was produced

in this regard. The court was asked to rely on the evidence of

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Mr. Bock solely coupled with certain admissions by the Applicant. The scales in our view are in favour of the Applicant's contention that he did not act unreasonably in the circumstances.

As concerns the issue of signing of manual batch listing, it is undeniable that this was the responsibility of the Credit Manager. This was a responsible Manager who could have been held responsible and accountable for any omissions in his work performance. The only offence that the Applicant could have been charged of in this regard was failure to ensure that the Credit Manager signed the manual receipts and batch listings. There is no evidence that the omission hereof resulted to any loss of cash or business and the Regional Manager had an equal responsibility to counsel the man directly responsible i.e. the Credit Manager to find out why he did not perform his work properly. It was not sufficient to leave it to the Branch Manager and then purport to dismiss him for another Manager's omissions.

The dates when the listings were not signed appear to coincide with the period the Applicant was under investigation and eventual suspension. It is not therefore a fair complaint against the Applicant that he failed to sign the batch listing dated the 6th June 1997 a period when he himself was under scrutiny and suspended around the same time. The assertion that the Applicant was suspended in the afternoon of the 5th June, 1997 and therefore should have signed the listings of the day in the morning borders on the ridiculous. There is no policy document before us which shows time limits within which verifications and signing should have been done by the Branch Manager. We surmise that the principle of reasonable time was applicable in the circumstances to ensure that money received from customers had been credited or posted to the relevant customers account number.

We find that the Respondent has equally failed to prove this offence against the Applicant on a balance of probabilities.

As regards the offence of failure to ensure the customer cheque on the 26th October, 1996 was specially cleared before authorising the transaction, the Respondent has equally failed to prove the charge against the Applicant on a balance of probabilities. We find that the Applicant did not directly deal with this customer on the material date. We also find that it is no excuse for Mr. Bock who had ultimately approved the transaction to blame the Applicant for lack of full or proper information. He was equally responsible to ensure that company policy and procedures were followed in each transaction. He was the final authority to ensure compliance as far as this transaction was concerned. Furthermore, the Respondent has failed to prove on a balance of probabilities that customer cheques had to be subjected to the same clearing procedure as third party cheques.

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In the circumstances, it is unreasonable to accuse the Applicant of failure to comply with a policy which in the least appears uncertain. Exhibit "R10" clearly does not support the charge against the Applicant and Mr. Bock's belated attempts to explain the anomaly was telling on his credibility. He was prepared to go to any length, contrary to the plain writing on the document he sought to rely on to get his man.

We do agree with the Applicant's contention that Mr. Chris Bock as a newly appointed Area Manager was zealous in his approach and handling of the problems experienced at Town Talk Manzini. This approach quickly destroyed a Manager who was a high performer in the eyes of the Managing Director of the company within a considerably short period.

The documentation of the cheque that eventually was referred to the drawer was done by the Assistant Manager. There is no evidence that the Manager handled this cheque at all. We take the Applicant's testimony that he was not at the shop when this customer and the Assistant Manager did this transaction as more plausible in the circumstances. The Applicant told the court that he signed the cheque later on 28th October, 1996 after the Assistant Manager had authorised the transaction to proceed. Respondent's

attempt to hold the Applicant liable for this transaction is tenuous in our view. The risk of defaulting customers is inherent in the hire purchase business the Respondent was involved in. Over the years the Applicant had handled his branches reasonably well and one transaction cannot reasonably be said to be sufficient to destroy the success story of an efficient Manager in a business that primarily sells goods on credit.

As regards the alleged failure by the Applicant to rectify weaknesses highlighted in the audit report, the Respondent too has failed to demonstrate that such failure seriously in the considerably short period under review, had reduced the performance of the Applicant to such intolerable levels, as to be deemed unreasonable to retain him any longer.

Again the over zealous nature of the new Area Manager carried the day leading to the unreasonable dismissal of a highly regarded employee of the Respondent.

Given the track record of Town Talk Manzini, the allegations concerning failure to maintain 340 names on the mail list appear unjustified to put it more mildly.

The Area Manager in our view had descended to the level of a Branch Manager and had in the process usurped the discretion of the Applicant in running the branch. His methods were in our view abrasive and not conducive to good industrial relations at the work place.

The allegations against the Applicant were ill founded, hastily done, improper, unfair and without proper basis on the Respondent's management manual.

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Even if some of the minor charges could be sustained against the Applicant, his track record stood tall and dismissal was completely unjustified in the circumstances of the case in terms of Section 42 (2)(b) of the Employment Act.

The Respondent's attempt to water down the credentials accorded to the Applicant by the Managing Director of the company just before he was apparently dismissed for poor work performance was infact telling on their shaky credibility more than anything else and we reject the assertions that the Applicant's record as described by the Managing Director was not indicative of his high performance in all areas of management in their Town Talk Branch as of May 1997.

The Applicant at the time of his dismissal earned E7,300 per month. He had been a Branch Manager in various stores of the Respondent for a period of five years. There is no doubt in our minds that the Applicant's record deserved very serious consideration before such a drastic step could be taken against him. He had been employed in 1984 and rose through the ranks until his dismissal on the 14th June, 1997 a period of 13 years.

In as much as the Applicant had not raised issues of unprocedural fairness in his papers, we have directed our attention to the substantive evidence brought before us and found that the Respondent had no justifiable reason to dismiss him. He was therefore substantively unfairly dismissed.

The Applicant is unemployed to date. He has suffered loss and hardship as a result of the dismissal. He has dependants who have suffered similar predicament.

We award the Applicant Twelve (12) months compensation for unfair dismissal in the sum of E87,660.00

Severance Allowance	E 36,692.40
One Months Notice	E 7,300.00
Additional Notice	E 13,476.96

TOTAL E 145,129.36

There will be no order as to costs. The members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT