

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 40/98

In the matter between:

NCAMSILE SHONGWE

APPLICANT

and

SWAZI LOTTERY TRUST (PTY) LTD

RESPONDENT

CORAM:

NDERINDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

S. SIBANDZE

FOR RESPONDENT:

M. SIBANDZE

JUDGEMENT

17/05/02

The Applicant seeks maximum compensation for unfair dismissal, notice pay, refund of unauthorized deductions in the sum of E435.64, payment in lieu of rest days in the sum of E4,148.00 and payment in respect of transport in the sum of E2,565.00.

The Application was brought in terms of Section 65 (1) of the now repealed Industrial Relations Act No.1 of 1996.

The Applicant was employed on the 12th October, 1995 as a cashier, promoted to supervisor in a lottery shop and was in continuous employment until the 23rd May, 1997 when she was dismissed.

In terms of annexure 'A' to the Application, the Applicant was dismissed in accordance with Section 36 (b), (d) (g), (j) and (i) of the Employment Act No. 5 of 1980. The letter of dismissal was signed by the Managing Director of the Respondent Mr. W. Wunderlich.

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The Applicant denies she committed any offence that warranted dismissal. She further states that no disciplinary hearing was held to prove the allegations made against her and the dismissal was wrongful, unfair and unreasonable.

She earned E1,348.20 as a monthly salary.

In her testimony she told the court that Mr. Wunderlich on the 27th May, 1997 told her that she had failed to fill in a safe control sheet in time. Her responsibilities included over all responsibility for cash and staff supervision at the shop.

It was a gambling shop and in the morning at 7a.m. she would open the shop, allocate float cash to the cashiers and prepare cash balances at the closing time which was 10p.m. in the night and prepare

banking.

The safe control sheet was a record of money handed over to her when the shop opened in the morning. She told the court that Mr. Wunderlich had on the day the shop opened given her less cash and instructed her not to fill the sheet until he brought more float but he did not. She therefore did not prepare the sheet before money was put in the machines. She had spoken to a Mr. Lucas about the instruction she had received from Mr. Wunderlich.

The issue was discussed in a meeting with Mr. Khumalo, another manager of the Respondent. All the Msunduzi staff were called to this meeting at Matsapha. They entered one by one. Mr. Wunderlich was present also.

She was informed that Msunduzi branch was not doing well and a decision had been taken to close the shop. She was then given a letter of dismissal and before she could say anything about the safe control sheet, Mr. Khumalo left the meeting. He told her that the Head office in Johannesburg had already taken a decision to dismiss her, while he walked out.

She was not accused of misconduct in that meeting. She was not charged for attending work under the influence of alcohol, she in fact told the court that she never took alcohol and had never done so in her life.

She was also not charged for borrowing money from a customer.

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She was 27 years old and was still unemployed though she tried to get alternative work. She was married with two (2) children.

In respect of the claim for rest days, she said she started working as a cashier at Manzini while she lived in Mbabane. She worked from 9.30a.m. to 10p.m. then. She did not take any rest days off. She was transferred to Mbabane as a supervisor when Msunduzi branch was opened in early 1997.

She also claims money spent for transport to and from work at night as she was offered no transport.

She too claims refund of money unlawfully deducted from her in respect of alleged shortages at Msunduzi shop on the day she was dismissed.

It was put to her that she never filled any safe control sheet at Msunduzi shop from the day the shop opened up to her dismissal. She denied the allegation stating that she was instructed to start filling the sheet after there was a float shortage. Initially the manager had instructed her not to fill the sheet as the float was inadequate.

She agreed she was not supposed to borrow money from a customer but denied ever borrowing money from any. She said she had borrowed money from a neighbour at Msunduzi called Michael who worked at O.K. He was a regular customer but she had borrowed money from him outside the shop as she knew him.

She was also accused of splashing water on a customer and going to work drunk. She denied the allegations.

We note that various allegations were put to the Applicant concerning what Mr. Khumalo will tell the court but he was eventually never called. Mr. Wunderlich was similarly not called to respond to the evidence of the Applicant concerning the alleged instruction he had given her and the meeting held at Matsapha.

It was in the alternative put to her that she was in any event redundant by fact of the closure of the shop. She argued that other branches were open and she could have been transferred just like her subordinates were relocated.

The Applicant in support of the transport and rest days claim further added that while she was based at Manzini, in the morning she boarded a bus and at night, hitch hiked. She spent about E4.30 per day for 19 months. She worked 7 days a week and was not given rest days nor paid in lieu thereof.

This evidence was not rebutted by the Respondent.

The Applicant further told the court that she had been requested to record the float on a piece of paper which she did and the Managing Director countersigned it whenever he came to the shop which he did regularly. Mr. Wunderlich did not rebut this.

The respondent called RW1 Sibongile Fikile Nkambule who worked at the Mall Lotto shop. She previously worked at the Msunduza branch with the Applicant as a machine attendant.

She said that she could not remember when the Msunduza branch was opened and that she did not know how much float the shop was given as that was Applicant's responsibility. She said that she used the safe control sheet on a daily basis at the shop during the opening and the closing. In there was recorded float for the day when shop opened and cash at hand during closing. The cashier and supervisor would sign it. The sheet was not prepared until a certain time but they recorded money on a daily basis at Msunduza shop.

She said that Applicant did not record safe control sheet and at one time she had prepared the sheet but Applicant refused to sign it.

She further said that the Applicant borrowed money at the Msunduza shop from a customer in her presence. This was after the customer won a jackpot of E1,500.

She knew Michael the customer and he resided at St Marks and not Msunduza.

She also added that the Applicant accidentally poured water on a customer while they were cleaning. Further the Applicant once came to the shop drunk during closing time. She added that she knew Michael very well as she went to school at St Marks where he lived.

She said Applicant came to work at 8.30a.m. and upon opening the shop, she left and came back during closing time. That is the way supervisor's worked.

She explained that they were paid double the rate for holidays worked, but she could not know if Applicant was paid for holidays as only the employer knew.

She insisted she was present when Wunderlich gave the float to Applicant when the shop was first opened and that the Applicant was supposed to fill the sheet though she did not know what was said to the Applicant by Mr. Wunderlich about the issue.

Msunduza shop was operational for only 3 months according to this witness and it was during that time when she saw the Applicant borrow E200.00 from the customer. It was during the time when the Applicant splashed water on a customer and came to work drunk. She said the issues were discussed in a meeting with Mr. Marwick Khumalo when the shop was about to be closed.

DW2 was Portia Nxumalo. She worked at Piggs Peak for the Respondent but previously worked at the Mall branch and Msunduza as a cashier. The Applicant was her supervisor. She said that Applicant did not fill the safe control sheets for about 11 days. When she queried why she did not fill the safe control sheet, the Applicant recorded the float in a piece of paper and requested her to sign it, but she refused.

This was to cover the 11 days.

According to her, the shop was opened for only two (2) months after which they were called to the Head Office at Matsapha and the employees were suspended. They were informed that there was a shortage and a sum of E435.63 was deducted from all the employees salaries.

The issue of Applicant having come to work drunk was discussed on the day they were informed that the shop would close.

Money shortage issue was only raised after the shop was closed. The issue of drunkenness or borrowing money too were not discussed until the meeting prior to the closure of the shop.

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She denied that Applicant was given instructions not to fill in safe control sheets.

DW3 was Michael Shabangu, a customer at Msunduza Lottery shop. He told the court that he met Applicant at the shop. He first knew her when she borrowed E200,00 from him after he had won a jackpot. He denied knowing her prior or having lived at Msunduza as the Applicant had alleged. This happened when the shop had just been opened. The surprising thing about his testimony was that he claimed to have lent E200.00 to a complete stranger. He alleged that the only reason he gave her the money was because she had introduced herself as a supervisor of the shop. She did not pay the money.

Another surprising aspect of this case is that inspite that the company is a local one, with its Directors and Managers situated in the country, non of the management members was called to tell the court the reasons why it dismissed the Applicant.

There is completely unsatisfactory evidence concerning whether the Applicant was charged for committing any offence or whether a disciplinary hearing was held where such charges were proven and equally unsatisfactory was the lack of evidence as to the company policy concerning the offences the Applicant is said to have committed and the penalties if any such offences would attract once they have been proven against the Applicant.

What we have is evidence of two employees who were subordinates of the Applicant both speculating on what transpired between the Applicant and management. The third witness Michael does not take the Respondent's case any further since he was never called by the Respondent to discuss the issue concerning the money allegedly he had given the Applicant prior to her dismissal.

The Respondent's attorney indeed conceded that no proper disciplinary hearing was held against the Applicant.

It is clear that the Applicant was confronted with the various allegations in a meeting where the closure of the shop was communicated to her.

In the absence of any evidence from the management of the Respondent it is difficult to tell whether the dismissal was due to the closure on grounds of

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redundancy or was because of the alleged misconduct which had occurred much earlier and not at all dealt with.

There is no evidence that the Applicant had any previous warning for misconduct. The court concludes that she had a clean record in the circumstances. Her subordinates were relocated to other branches of the Respondent and it seems that the allegations against her were raised as a last ditch effort not to

redeploy her to another shop upon closure of the Msunduza branch which did not last for more than three months.

The Applicant since 1996 had worked at the Manzini Branch as a cashier and was transferred to Msunduza branch on promotion as a supervisor. She denies all the allegations against her which after all have been leveled by her former subordinates who still work for the Respondent. She had no opportunity to confront them prior to her dismissal in the absence of a disciplinary hearing. The court finds that on a balance of probabilities the Respondent has failed to show that it dismissed the Applicant for a reason provided under Section 36 of the Employment Act.

Furthermore, the Respondent has also failed to show that in the circumstances of the case, it was fair and reasonable to dismiss the Applicant.

The Applicant was a married mother with two children. Her demenour in court was credible and straight forward. We do not give much weight to the issues of credibility raised by the evidence of RW3, Michael Shabangu as it appears improbable that he would have lent E200,00 to a total stranger as he alleges.

The evidence by the Applicant concerning the money owed to her in lieu of rest days was un rebutted since no one with reasonable knowledge about the issue came to testify before us. This is also true of the claim in respect of transport.

The Applicant has on a balance of probability established that indeed she was entitled to the payments aforesaid.

The evidence before court is that the Respondent was engaged in gambling business and was duly registered in terms of the laws of the country. We have no doubt that the business was subject to the regulations of wages as

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set out under Legal Notice No. 62 of 1997 in the Hotel and Catering Trades, under which casinos and gambling houses fall. The Notice is promulgated in terms of the Wages Act, No. 16 of 1964.

Regulation 14 provides that an employee shall be entitled to one rest day with full pay in every period of seven days. The Applicant worked for seven days in a week and was neither given or paid in lieu of rest days in seven days.

The Applicant was not provided with accommodation while she reported to work at Manzini from Mbabane. She was not reimbursed money expended for transport yet according to her evidence she remained at work up to 10p.m. at night.

The aforesaid evidence was not rebutted even though it was put to her that Mr. Khumalo and the Respondent would contest such evidence. The subordinates who testified did not take the Respondent's case any further as they lacked details as to whether the Applicant was entitled to the claims. The deduction made to the Applicant's salary must equally be refunded.

In the result we find that the Respondent dismissed the Applicant wrongfully and unfairly and that it was unreasonable to dismiss her in the circumstances of the case. The court awards her six (6) months salary as compensation for the dismissal. She will be paid one month's pay in lieu of notice.

The computation will be as follows :

NOTICE PAY	E 1,348.20
COMPENSATION	E 7,089.20

PAYMENT FOR REST DAYS	E 4,148.00
PAYMENT FOR TRANSPORT	E 2,565.00
REFUND FOR UNAUTHORISED DEDUCTION	E 435.64
TOTAL	E15,586.04

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There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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