



recorded a statement from the applicant in which the applicant admitted stealing the money. He was charged with theft of E207,796-. He was acquitted and discharged by the Manzini Principal Magistrate at the close of the crown case.

According to applicant the money taken by the police was proceeds from the sale of a kombi which he bought from respondent. The kombi was sold for E50,000-, Mr. Joshua Magongo (AW2) bought the kombi and paid an initial deposit of E30,000-. Applicant stated that this was the money taken by the police. He stated that there was no connection between this money and the money stolen at the respondent's undertaking.

AW2 confirmed that he indeed bought a kombi from applicant - and that he bought the motor vehicle for E50,000-. He also confirmed that he paid the E30,000- deposit cash. He also showed the court Exhibit H, the agreement they signed for the purchase of the motor vehicle.

Counsel for respondent on cross-examination of both AW1 and AW2 concentrated to a greater extent on the value of the motor vehicle. He enquired from AW1 how he could sell a motor vehicle worth E23,811- for E50,000-. Mr. Smith also questioned AW2 as to why he bought a motor vehicle worth E23,811- for E50,000-

According to applicant the motor vehicle was converted from a panel van into a passenger vehicle. When Mr. Magongo (AW2) bought it for E50,000-it was after the conversion.

At the close of the applicant's case the respondent made an application for absolution from the instance. Mr. Smith bases his application on the following points:

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1. That applicant made a statement to the police as a confession for having stolen the money.
2. That money was found hidden in applicant's room.
3. That the applicant sold a motor vehicle for E50,000- when the motor vehicle only costs E23,000-
4. That the applicant called a witness who came to court and corroborated a lie. The same witness refused to disclose the bank statement which shows a withdrawal of E10,000- which he allegedly made when he paid the E30,000- deposit to applicant.

He therefore stated that for the above reasons there was no case that the respondent had to meet.

The lines along which the court should address itself to the question of whether it will at this stage grant a judgement of absolution have been laid down in the leading case of GASCOINE V PAUL AND HUNTER 1917 TPD 170. See also LYMINGTON ESTATE LTD V MURPHY 1949 (1) SA 564.

In GASCOIN'S case supra per De Villions JP at page 173 it is stated "at the close of the case for the plaintiff therefore, the consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? ...The question therefore is at the close of the case for the plaintiff was there a prima facie case against the defendant; In other words, was there such evidence before the court in which a reasonable man might but not should give judgement against the defendant? "

Our law of unfair dismissal is governed by the Employment Act. Section 42 (1) of the Employment Act states :-

"In the presentation of any complaint under this part the employee shall be required to prove that at the time his services were terminated that he was an employee to whom Section 35 applied. "

Section 42 (2) provides:-

"The services of an employee shall not be considered as having been fairly terminated unless the employer proves:-

- a) That the reason for the termination was one permitted by Section 36; and
- b) That, taking into account all the circumstances of the case, it was reasonable to terminate the services of an employee."

Clearly once Section 42 (1) has been complied with the onus shifts to the respondent to show that the termination of services was one permitted by Section 36 of the Act.

In the instant case it is our considered opinion that the applicant has proved that he was an employee to whom Section 35 of the Act applied. Secondly that his services were terminated by the respondent.

The respondent should prove that applicant's services were terminated fairly within the meaning of Section 36 of the Act, and that taking into account all the circumstances of the case it was reasonable to terminate the services of applicant.

This is not one of the cases where the respondent can apply for absolution from the instance. I agree with Mr. Lukhele for the applicant that the application by Mr. Smith is misguided. The respondent must discharge the onus resting upon it.

Under circumstances the application for absolution from the instance is hereby refused. Respondent to lead evidence proving that the dismissal was fair and in line with Section 36 of the Employment Act, and that taking into account all the circumstances of the case it was reasonable to terminate the services of the applicant.

No order as to costs.

The two members have concurred.

KENNETH NKAMBULE

JUDGE (INDUSTRIAL COURT)