

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 18/99

In the matter between:

JIM ZULU

APPLICANT

and

INYATSI SUPERFOS

RESPONDENT

CORAM:

NDERINDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

K. DLAMINI

FOR RESPONDENT:

Z. JELE

JUDGEMENT

12/07/02

The Applicant seeks maximum compensation for unfair dismissal and terminal benefits emanating thereof. The Application was brought pursuant to a certificate of unresolved dispute issued by the Commissioner of Labour in terms of Section 65 (1) of the Industrial Relations Act No.1 of 1996.

The claim is premised on the following particulars of claim:

That the Applicant was employed as a bull dozer operator by the Respondent in 1995 and was so employed continuously until the 14th March, 1998 when he was unlawfully and unfairly dismissed for negligence while performing his duties at a construction site.

The Applicant admits that while he was operating a dozer, he accidentally ran over and damaged a water pipe which was below the surface.

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The applicant alleges that when the site foreman Mr. Peterson arrived at the scene of the accident, he summarily dismissed him and asked him to go home immediately. He asked him to come back on Monday, that followed to the head office to collect his final dues.

Upon arrival at the head office, the Applicant was served with a suspension letter annexed to the Application and marked 'B'.

The letter of suspension states that the Applicant had been charged and was to appear before a disciplinary tribunal on the 23rd March, 1998.

The disciplinary hearing was held wherein the issue of the accident was discussed. The Applicant was given a final warning and was told to resume work. He was asked to report to a manager at the site.

When he reported to the site, he was assigned to clean a manager's office and he declined. He went to report the dispute to the Labour department.

At the time of dismissal he said he earned E1,300 per month and was paid overtime. He was not paid salary for the month of March nor was he paid terminal benefits upon dismissal. He was 64 years old and had many grand children who were dependant on him. He had not found alternative job inspite of his efforts to do so. As a result he had suffered loss and damage. His age was the greatest impediment to acquire a new job.

The Applicant's case was supported by AW2, Amos Masilela who was at the construction site at the material time. He corroborated the Applicant's evidence that upon causing the accidental break of the pipe, the site supervisor, Mr. Peterson asked him to park the dozer and go home and return on Monday to collect his pay. Mr. Peterson according to the witness dismissed the Applicant. The witness did not know what happened subsequently but the Applicant left the site as instructed.

The Respondent in its Reply stated that the Applicant earned E1, 154.25 but not E1, 300. Mr. Mbingo denied that the Respondent dismissed the Applicant at the site or at all but that he was given a final warning for negligence after a disciplinary hearing. The Applicant according to Mr. Mbingo failed to return to work after the disciplinary hearing but was never dismissed.

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Mr. Mbingo upon being told by the Applicant that he had been dismissed by Mr. Peterson, had advised him that Mr. Peterson did not have such authority and asked him to report to the disciplinary inquiry on the 23rd March, 1998, which he did, After the final warning was given to him, he was allowed two days off and then report to the site. Mr. Mbingo told the court that he later on was called to the Labour office to attend to the dispute reported by the Applicant. He told the court that he was not in a position to tell the court whether the Applicant infact reported to the site as instructed and Mr. Peterson had since left the employ of the Respondent. He only heard at the Labour office that when the applicant returned to the site he was instructed to clean a manager's office which he declined. He was told that there was no more work for him as a dozer operator and he went to Labour to report the dispute.

Mr. Mbingo was shown a letter dated 24th March, 1998 written by him to the Applicant terminating Applicant's service with effect from 22nd April, 1998 on grounds of redundancy. Mr. Mbingo expressed surprise at the letter and wondered how the Applicant had received it since he could not remember dispatching it to him.

The letter was apparently written one day after the final written warning was issued to the Applicant on the 23rd March, 1998.

Mr. Mbingo admitted that he wrote the letter and that Applicant's position had become redundant but he did not know whether he had been paid his terminal benefits.

It would appear to the court that Mr. Mbingo was not candid with the court on the issue as to whether the Applicant's service was terminated or not in his evidence in chief. He had conveniently avoided the letter he had written on the 24th March, 1998 giving the Applicant notice of termination.

The evidence of the Applicant to the effect that he had been sent home by his supervisor Mr. Peterson after the accident and that upon his resumption of work he was advised that there was no more work for him as a dozer operator is probably true in the light of the inconsistencies in the evidence of Mr. Mbingo.

The Applicant's evidence was well supported by AW2.

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The Respondent failed to call Mr. Carmichael, the Applicant's manager nor Mr. Peterson the supervisor to

counter the Applicant's evidence on what transpired at the site on the day of the accident and upon his resumption of duty.

The court finds that the Applicant was dismissed by the Respondent and that he did not abscond from work.

The court is satisfied that the Applicant's termination was not fair as it was not for a reason permitted by Section 36 of the Employment Act No. 5 of 1980.

Furthermore, in terms of Section 42 (2) (b) taking into account all the circumstances of the case, it was not reasonable to terminate the services of the Applicant because he had merely broken a water pipe that was underground and according to him, its location was not properly marked. He also had no previous written warning for poor work performance that would have warranted a dismissal in terms of Section 36 (a) of the Act.

The evidence on the monthly salary the applicant earned is conflicting, however, it is common cause that he earned E6.75 per hour. A calculation on a basis of 21 days x 8 hours x E6.75 gives us a figure of E1,134.00 per month. This is the monthly figure the court will apply.

Considering the period of Service by the Applicant, his age, the loss and suffering he had undergone as a result of the unlawful termination, the court awards him eight (8) months salary as compensation for unfair dismissal in the sum of E9,072.00.

Severance Allowance	E 1,080.00
Additional Notice	E 432.00
Salary for March	E 1,134.00
Notice Pay	E 1,134.00
TOTAL	E12,852.00

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The Respondent will pay costs of the suit.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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