

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 34/2000

In the matter between:

TIHLOBOTAKHE ZULU

APPLICANT

and THE KIRK TRUST

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT:

MR. S. KUBHEKA

FOR RESPONDENT:

MR. MNTJALI

JUDGEMENT

25/10/02

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 made out of the following particulars of claim:

That the applicant was employed by the respondent on the 13th October 1995 as a farm manager and was so employed continuously until the respondent terminated his services on the 10th February 1998. Applicant avers that his dismissal was both procedurally and substantively unfair. At the time of dismissal the respondent was earning E2,750- per month. The respondent terminated the employment of the applicant on the basis that the applicant

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had committed a dishonest act, and for poor work performance which allegations the applicant denied.

It is common cause that a hearing was conducted and applicant was found guilty on both counts. On appeal the applicant was acquitted on the count of poor work performance. He was found guilty of committing a dishonest act.

Regarding the second count of dishonesty the applicant told the court that the dogs from nearby homesteads got into the farm and killed a sheep. According to the applicant he reported this to his employer. The employer ordered him to tell the owners of the dogs to pay him E400- as compensation. The owner of the dogs gave applicant a sum of E200-. He promised to settle the balance at the end of the month.

When the respondent arrived to the farm applicant reported that the owner of the dog had made a payment of E200- regarding the sheep and he wanted to give him the money. The respondent refused to take the money and said he would only take the money after the owner of the dog had paid the balance of E200-.

According to applicant he kept the E200-. The owner of the dogs paid the balance after some time. Applicant told the court that his intention was to give the money to respondent, but each time the respondent came to the farm he was always in a hurry.

According to Tommy Kirk, RW2, the applicant did not tell him that there was a missing sheep. He only gave the explanation when he was asked of the whereabouts of the sheep. That is when applicant stated that the owner of the dogs was prepared to compensate him (respondent) and that he had paid E200 as compensation.

According to Mr. Kirk he told the applicant that the sheep was worth E400-and the applicant promised that he would collect the balance. Respondent then instructed the applicant that he would like to receive the full amount as soon as the payment was made.

Mr. Kirk told the court that the E400- was not paid until after the disciplinary hearing. Respondent had asked for the money on the 26th January 1998 and the response from the applicant was that he could not give him the money because the trust was owing him money. Respondent then

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gave him his money. Applicant then promised to pay the money on the 31st January.

After the 31st January respondent asked for his money again and the applicant said he had banked the money at First National Bank.

According to the respondent the dishonesty arose out of the fact that the applicant did not report that there was a missing sheep and that when eventually compensation was paid the applicant could not hand over to the respondent the money timeously.

According to the respondent it was further discovered on appeal that the money the applicant said had been deposited in his bank account at First National Bank had in fact not been deposited. However, what is important in this regard is that there was a sizable amount of money in this account. This balance was by far greater than the E400- wanted by the respondent.

The respondent, both RW1 and RW2 made great emphasis on the fact that the applicant was not cooperative during the disciplinary hearing. When one goes through the record it is clear that the complainant Tommy Kirk was not giving evidence but was probing the applicant. He had assumed the role of both the chairperson and the prosecutor.

This is however, understandable. Tribunals at the work place are conducted by lay persons who have no knowledge of procedure. From the record it is clear that the applicant was challenging the way Mr. Kirk was dominating the proceedings. At some instances heated words were exchanged and the applicant decided not to answer questions posed by Mr. Tommy Kirk. Such communication break down cannot be attributable to applicant's non cooperation, but to the procedure used in the hearing. If Mr. Kirk was given time to relate his side of the story and when he was through, a response be heard from the applicant there would have been no break down in communication. However, in this instance Mr. Kirk was allowed by the chairperson, who is his son to put questions to the applicant when he was supposed to be telling the tribunal of what transpired. Applicant would refuse to respond to such questions in the middle of Mr. Kirk testimony.

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The issues that arise for determination are as follows:

A. Whether the applicant in terms of Section 42 (2) (a) was dismissed for a reason permitted by Section 36 of the Employment Act.

B. Whether in terms of Section 42 (2) (b), it was just and reasonable taking all the circumstances of the case to dismiss the applicant.

In answering the first question; the question is whether the respondent has proved on a balance of probabilities that the applicant had committed a dishonest act.

It is common cause that the applicant did not hand over respondent's money in time. But what is in the test is the applicant's intention or purpose of not handing over the money to the respondent.

To determine whether the applicant had any dishonest intention in doing so the court has to evaluate his explanation, determine his credibility and also find corroboration of the explanation if there is one. The onus rests on the respondent to prove, on a balance of probabilities that his intention was dishonest.

Mr. Tommy Kirk has given evidence that on three occasions he had demanded his money from the applicant who told him that the money was deposited at F.N.B. Mr. Kirk has admitted in cross-examination that applicant had told him that the owner of the dogs had tendered to him E200- and the money was in the applicant's possession. However, Mr. Kirk himself told the court that applicant should tell the owner of the dogs that the sheep was worth E400- and not E200- and that applicant must give him the money as soon as the owner of the dogs pay the balance.

Applicant's testimony is to the effect that he kept the E200- while waiting for the owner of the dogs to pay the balance. Mr. Kirk got information that the balance had been paid and when he enquired about this the applicant readily told him that indeed the money had been paid but that it had been deposited in the bank.

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On appeal the chairperson admitted new evidence. She ordered the applicant to produce the bank transcript relating to the E400-. There was however, no reflection of the E400-. We are not told whether there were other deposits deposited in the account on the day in question. What we were told is that the transcript reflected a balance exceeding E400-.

From the foregoing it is clear that at all material time the applicant's intention was to pay the money to Mr. Kirk. He even told Mr. Kirk of his account at F.N.B, which indeed was found to have a balance by far exceeding E400-.

It is however, clear that the money he was given by the owner of dogs might have been used with an intention that it would be replaced by the amount in his account at the F.N.B, Mr. Zulu decided not to tell Mr. Kirk that he had used the money and that he would withdraw from his account and pay him. Instead he opted for a way out. He decided to tell lies that he had banked the money in his account. By so doing the applicant was dishonest.

The respondent has succeeded to establish in the light of the foregoing that the applicant committed a dishonest act. It therefore follows that the applicant was dismissed for a reason permitted by Section 36 of the Employment Act.

The second leg of the enquiry is whether it was just and reasonable taking all circumstances of the case to dismiss the applicant. As mentioned above, at no stage did the applicant show an intention of keeping the E400- compensation for himself. At all material times his intention was to hand over the money to respondent.

Respondent told the court that there was some money that the applicant was owed by the company. The applicant had mentioned that he would like to receive such money before he could pay the E400- to the respondent. The respondent duly complied and paid the money. At this juncture the applicant told the respondent that he would pay him his money on the 31st of January 1998.

Another aspect that should be taken into consideration is the fact that the applicant worked out of town.

His place of work was far from town and it was not easy for him to come to town on a regular basis. If he had used the E400- it would be very difficult to go to town during working hours and

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make a withdrawal to pay the respondent. Clearly one could not infer theft from such behavior.

Applicant further explained that at the period in question he was not in good terms with Mr. Tommy Kirk. This is borne by the record of the disciplinary hearing. When asked as to why he did not hand over the money earlier (at the time it was paid to him) applicant answered and said that when the respondent came he was always in a hurry and on top of that there was always some tension between them as respondent would complain of many things.

It is clear that the nature of the job and the way the applicant executed his job was such that in most occasions he was not with Mr. Kirk. Mr. Kirk would come for short periods and then leave. In some instances the applicant would use his own money to help where there had been some shortage of farm supplies such as fuel. Such money was not easily payable by the respondent. This was conceded by the respondent himself when he said applicant told him that when he pays him his E400- he would deduct the amount that the company owed him (applicant).

Applicant was employed by the respondent and was salaried. It was easy for the respondent to deduct the E400- from his salary if the applicant was unable to pay him. This is because the applicant had acknowledged his indebtedness to respondent.

In the circumstances it was unreasonable to terminate applicant's services. This is more so because of the nature of the job and the proximity of the farm from Matsapa where Mr. Kirk operates.

In the result the dismissal of the applicant was substantively and procedurally unfair.

In determining the award to grant the applicant the court has considered that the applicant is married to two wives and has seven children four of which are school going. His two wives are not employed and applicant is the sole breadwinner. At the time of dismissal he earned a salary of E2,750-.

Taking these factors into consideration the court awards the applicant six months compensation for unfair dismissal.

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6 x 2750	=	E16,500-
Payment in lieu of 2 days leave	=	212-
Additional notice	=	424-
Severance pay	=	1060-
Total		E18.196-

No order as to costs

Members agree.

KENNETH P, NKAMBULE

JUDGE - INDUSTRIAL COURT

