

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 110/98

In the matter between:

THEMBA NDZIMANDZE

APPLICANT

and

J. D. GROUP INVESTMENTS (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

M. MNISI

FOR RESPONDENT:

Z. JELE

JUDGEMENT

15/04/02

The Applicant brought an application for determination of an unresolved dispute in terms of Section 65 of the Industrial Relations Act No. 1 of 1996. He claims compensation for unfair dismissal and payment of notice pay, additional notice pay, severance pay and leave pay being terminal benefits emanating from the dismissal.

The Applicant was employed in 1993 and was in continuous employment until the 19th November, 1997. At the time of dismissal he worked as a stock controller at Price n' Pride Furniture warehouse at Matsapha and earned E2,005 per month.

The claim for payment of additional notice pay was truck off by the court since the same was not conciliated upon and does not appear on the certificate of unresolved dispute.

1

The Respondent denies that it dismissed the Applicant unfairly in that the Applicant was charged and found guilty of misappropriating company property that was discovered by Police in his house. He was subjected to a disciplinary hearing which found him guilty as charged. That the Applicant appealed against the finding of guilt but the appeal was dismissed.

The Respondent further denies that it did not afford the Applicant a representative of his choice in terms of company policy but admits that it did not allow an attorney to represent the Applicant since he was entitled to representation by a co-employee in terms of the disciplinary code.

One of the charges preferred against the Applicant was that of conducting himself in an unofficial capacity in such a manner as to expose the Respondent to financial loss and failure to report stock losses when same occurred under his supervision and control.

The Applicant in his testimony stated that as soon as he was appointed to the position of stock controller,

he had a dispute with the shop manager since

stock taking was not done before the hand over to him and that he was called to a stock take on a Sunday while he was off duty which he was unable to attend due to pre-arranged commitments for the day.

The notice to report to work on the Sunday was too short and the manager refused to countenance his explanation that he would not be able to report for work.

On Monday when he reported for work, the storeroom keys had been taken by the manager. He had obtained the keys from the Applicant's wife at his house. The Applicant said it was irregular, especially because no stock take had been done during the hand over and the Applicant would be unable to tell if there was a shortage of stock, and if any, when it had occurred.

On the 31st August, 1997 Police Officers came to the work place and led him to his house. They conducted a search. The Officers had a sheet of paper with a list of furniture items they were looking for which comprised of 3-piece bedroom suite, conti-mini multirobe, 3-piece hillary lounge suite and hifi with speakers. He saw the list before they entered the house.

2

The Police brought a shop stock clerk to help identify the items in the house. They took a felicity headboard with pedestals and conti single robe and two seater hillary lounge suite.

The Applicant told the court that these items did not correspond to those the Police were looking for.

The Applicant explained that he had bought the felicity headboard with pedestals from a second hand dealer named Tembe and the lounge suite from an Indian 2nd hand dealer who he could not remember his name.

That he had bought the conti-single robe from a driver of a delivery truck that delivered stock to the Respondent. The driver's name was Moses Ramosa. It was an extra item which they did not collect and instead offered to sell it to him at E200.00. He paid E150.00 for it. Under cross examination he contradicted himself on the actual amount paid.

After a stock take conducted on the 27th August, 1997 the Applicant was informed that there was shrinkage of stock and was given a letter of suspension by the manager. He remained suspended for about 2 - 3 months.

He was then called to a disciplinary hearing. His lawyer was not allowed to represent him. He was asked to bring a co-worker. After the proceedings which the Applicant described as irregular, he was dismissed. He appealed but was also unsuccessful.

Under cross examination the Applicant admitted that the bedroom suite had a company sticker on it. He said that he had bought it from a 2nd hand dealer by the name of Tembe based in Johannesburg, He bought it at the Swaziland Warehouse. He bought it for about E400.00 though its value in his view was between E999.00 - E1,200. He however could not deny that its value was about E1,850. Tembe collected the 2nd hand item from the shop before selling it to him. He said it was cheaper buying from the dealer than doing so directly.

The Applicant told the court that when the stock is sold to second hand dealers, the stickers are not removed.

Tembe auctioned his stock, hence it was cheaper to buy from him. He alleged though that employees were allowed to buy 2nd hand items directly

from the shop. He was at a loss to explain if he bought from Tembe the bedroom suite at a lesser price than Tembe had bought from the shop.

He said he had in the past bought 2nd hand items from the warehouse apart from the one he bought from Tembe. He had no receipt from Tembe and was not given one, he testified.

The bedroom suite was classified as non standard as the stool was missing and it had no dressing table.

As concerns the single robe, he said he bought it from a Johannesburg truck. He bought it for between E150.00 - E200.00, He had offered a purchase price of E50.00 but the truck crew declined. The robe was always sold in a set but not single as he had bought it. He said nothing forbid him from buying furniture from the Respondent's transport crew. As for the hillary lounge suite he bought it from an Indian. He said that he had bought it for E250.00 though in chief he said that he bought it for between E300.00 - E600.00.

The bedroom suite was still covered in plastic but he insisted that it was second hand.

The Applicant abandoned the disciplinary hearing before he had testified. He appealed the decision of the disciplinary hearing. This was conducted like a full hearing and the dismissal was upheld.

He denied that Ambrose had identified a company sticker on the single robe.

The wrapping on the furniture he alleged was not original but was done by the warehouse employees to keep off dust.

The Applicant upon interrogation by the Police was indicted. The items found in his house were taken into Police custody. He was however not prosecuted. The items got lost in Police custody and he obtained an order for restitution of the furniture pursuant to which the Respondent replaced the items.

It was alleged that the Applicant deliberately avoided to be present during a Sunday stock take because he was aware of the missing items.

He said he was not aware of a staff buying policy. He further said he was not aware that he could not purchase from the suppliers of the Respondent nor did he know that staff could not buy trade-in, repossessed items or items that had been marked down.

He said he was aware only that they could not buy repossessed goods but they could buy from 2nd hand dealers.

He agreed that evidence was led at the inquiry identifying the items at his house as having come from the Respondent's shop.

Applicant said he was not in a position to bring to court people from whom he had bought the furniture items nor did he show a single receipt for the items.

The Respondent called Louis Johannes Buys as RW1. He was presently self employed but at the material time was Field Credit Manager for the J.D. Group of companies.

He knew the Applicant as he chaired the appeal hearing against him. He produced the record. The appeal was conducted as a full disciplinary hearing because the Applicant had abandoned the disciplinary hearing halfway.

He told the court that a stock take at the warehouse had found a robe, bedroom suite and lounge suite

missing. Similar items were found at the Applicant's house. The conti-robe in particular had a company sticker and according to the company procedure, goods in custody of a supplier and not yet received by the shop, do not bear company stickers. Therefore the robe could not have been bought from a supplier. It came from the shop.

The Applicant did not produce a receipt prepared from where he claimed he bought the felicity bedroom suite nor did he produce an invoice or delivery note.

Computer records did not show that he had bought a felicity bedroom suite from the company. The headboard was still covered in a plastic meaning it was a new item and not 2nd hand.

5

The hillary lounge suite was also wrapped in a plastic. That particular design was currently on sale by the company. The explanation that he bought it from an unknown Indian was not satisfactory. No receipt was produced either nor did he call any witnesses to authenticate his story.

It was illegal according to the witness to buy from a delivery track because the stock belonged either to the supplier or to the buyer.

He upheld the decision of the disciplinary hearing to dismiss the Applicant as he was guilty of misappropriating company property. He also abused position of trust.

The court is satisfied that the Applicant was in possession of property that was specifically manufactured for the Respondent. That some of the items bore company identification stickers. That the Applicant failed dismally to explain or to show that he had lawfully obtained the items from the Respondent's shop or warehouse.

The Applicant was a stock controller and in a position of trust. He abused his position to the detriment of his employer.

Though he was not prosecuted by the Police, and as a result was able to recover the items confiscated from him by the Police, the Respondent, has on a balance of probabilities shown that it dismissed the Applicant for a reason contained under Section 36 of the Employment Act, 1980 and that it was just and reasonable, taking all the factors into consideration to dismiss the Applicant.

In the result, the Application fails in its entirety.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

6