

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 25/2000

In the matter between:

VUSI TSABEDZE

APPLICANT

And

CONSTRUCTION ASSOCIATES (PTY) LTD

RESPONDENT

CORAM

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

A.LUKHELE

FOR RESPONDENT:

Z. JELE

JUDGEMENT

17/04/02

The Applicant brought an application for determination of unresolved dispute in terms of Section 65 of the Industrial Relations Act, 1996. He claims maximum compensation for unfair dismissal, notice pay. 30 days in lieu of leave, four days payment for each month worked in one year as overtime, and underpayment for April, 1998.

He was employed in April, 1997 as a night security guard and was in continuous employment until the 20th April, 1998 when he alleges he was dismissed unlawfully and unfairly. In the alternative he claims that the conduct of the Respondent towards him resulted in a constructive dismissal as he could no longer reasonably be expected to continue in his employment.

At the time, he earned E980.00 per month.

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He reported a dispute to the Labour Commissioner but was not resolved, hence this Application.

The Applicant told the court that a generator engine got lost at the Engen Fuel Service which was under construction by the Respondent during the Easter holidays. He was the night guard and usually handed over to a day guard.

He was not aware how the engine got lost and was asked to make a statement to the Police together with the day watchman.

After making the statement he reported to work but was told by Mr. Chrispin Simoes, DW3, to stay at home until he was recalled. The Respondent did not recall him but only paid him E980.00 on the 20th April, 1998 which was the pay day.

On the 25th April, 1998 he went to the Site Foreman, Mr. Limmah to enquire about his employment status

but he told him that Mr. Chrispin Simoes' decision was that he must stay at home. He was paid E64.00 for the month of May.

He was never recalled and still remained unemployed todate. He said he was bom in 1965, has a wife and three children. That he has found it difficult to find alternative employment since the Police case was not finalized todate.

He further said that though he was entitled to go on leave for 14 days in a year, he never got any leave for the one year he worked.

He also explained that he worked from 4 p.m. to 7 a.m. every day i.e. 15 hours for the whole year but was not paid overtime. He added that he was owed 69 hours as overtime.

When under cross examination, however, it was put to him that he was paid all the overtime worked, he responded that he could not dispute that. The claim for overtime must therefore fail.

The leave claim for 14 days was not put to serious dispute and the same succeeds.

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Concerning the issue of dismissal, the Respondent through DW1 and DW2 alleged that the Applicant absconded from work after the loss of the generator engine and that to their knowledge, they did not dismiss the Applicant.

On the other hand DW3, the Site Manager told the court that after the theft, he asked the Applicant to stay at home until the case was finalized by the Police or until he was recalled. He did not thereafter recall the Applicant. This testimony was inspite that of DW1 and DW2 who told the court that DW3 had no power or authority to dismiss the Applicant. DW3 was the Contracts Manager and was senior to DW1 and DW2.

It is the court's view that DW1 and DW2 were not candid with the court, their evidence was untruthful and the court cannot rely on it. DW1 being the Site Clerk must have been aware that DW3 the Contracts Manager had told the Applicant to stay at home. It is noted that DW1 Musa Ginindza was the Site Clerk responsible for all material and property on site and because the issue at hand was loss of equipment at site, he must have been involved in the matter entirely and hence could not have been unaware of the decision taken by the contracts manager concerning the Applicant.

On the other hand Sam Ginindza was the Assistant Foreman. He had authority over the Applicant at site. He is the one who discovered the theft of the generator. He told the court that the Applicant disappeared and that he was not dismissed by Mr. Simoes. He insisted that Mr. Simoes had no authority to dismiss any employee without the Assistant Foreman and the Indunas. This was contradictory to the testimony of Simoes and was in our view untruthful.

The Applicant has on a balance of probabilities proved that he was dismissed by DW3, Mr. Simoes the contracts manager who was senior to DW1 and DW2.

The Respondent instead of justifying the dismissal gave contradictory evidence. DW1 and DW2 denied ever dismissing the Applicant at all, whereas DW3 admitted that he sent him home and never recalled him back.

No disciplinary hearing was conducted against the Applicant. He was dismissed on mere suspicion of theft due to his position as a night watchman.

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There was a day watchman and no evidence was offered as to who was responsible for the disappearance of the generator.

The Police investigation did not bear fruits at all.

In the circumstances of the case, the Respondent has failed to show it dismissed the Applicant for an offence under Section 36 of the Employment Act. It has also failed to show that it was just and reasonable to dismiss the Applicant.

Since the Applicant had worked for only one year, and that he was still unemployed due to the stigma from the allegation by the respondent, he has suffered financial loss and damage, and we award him 5 months salary as compensation for unfair dismissal in the sum of $E980 \times 5 = E4.900$.

In addition he will receive E980.00 as notice pay and $14 \text{ days} \times E46.66 = E685.24$ in lieu of leave.

TOTAL	4,900.00
	980.00
	653.24
	E6,533.24

No order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT