IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 259/2000

In the matter between:

JEROME MANYATSI APPLICANT

and

EMALANGENI FOODS (PTY) LTD RESPONDENT

CORAM

KENNETH NKAMBULE : JUDGE

DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

FOR THE APPLICANT : M.Z. Mkhwanazi

FOR THE RESPONDENT : K. Motsa

JUGDGEMENT

30/5/03

The applicant seeks unconditional re-instatement; alternatively payment of a total sum of El5,000- (fifteen thousand Emalangeni) as compensation for unfair dismissal and terminal benefits amounting to E5,100- (five thousand one hundred Emalangeni). The application for unresolved dispute was brought in terms of Section 65 (1) of the Industrial Relations Act No. 1 of 1996. Conciliation of the dispute had failed and the commissioner of Labour issued a certificate of unresolved dispute.

The applicant's case in a nutshell is that he was employed by the respondent on 2nd August 1993 and he was in the continuous employ of the respondent thereafter until the termination of his services on 11th October 1999. The reason for the termination was that the applicant refused to take

lawful instruction. At the time of the dismissal the applicant was a truck driver earning a monthly wage of E1,300-.

The applicant gave evidence under oath. He told the court that his job entailed delivering food stuffs to all chain stores in Swaziland. In the performance of his duties the applicant had an assistant. According to the applicant, as a condition of his employment he was entitled to two assistants instead of the one he had.

According to the applicant, as a consequence he found himself delivering goods which was not his duty but that of the van assistant. This extra work would sometimes cause him not to do his work properly and as a result he would have some shortages and such shortages would be deducted from his salary.

Applicant told the court that as a result of this working condition he approached management and told them that he was no longer going to off load the trucks because this caused a lot of problems for him. Having raised this grievance he was told to stop working. He was called for a hearing. The result of the hearing was dismissal.

According to respondent witness No. 1 Mr. Ronnie Egambaram on the 27th day of September 1999 three drivers including the applicant came to his office and requested additional van assistants. Mr. Egambaram, who was the general manager told them about the company's financial situation and that there was no need for additional van assistants.

Mr. Egambaram told the court that the drivers then asked him that if the company cannot afford an additional man they would ask for an increase. He told them that the company reviewed salaries only in June each year and that in June the company would consider the grievance.

The other two drivers left and the applicant remained behind and stated that he was no longer prepared to continue with

his job. According to RW1 he asked applicant if he was sure of his decision and he answered in the affirmative. RW1 then asked applicant to go and fetch one Abner from the warehouse. Applicant came back with the said Abner.

In the presence of Abner RW1 asked the same question again. His response was the same. RW1 then decided to go and look for a casual driver. He got one outside the gate.

RW1 then asked applicant to go home and come back on the following day. On the 5th October 1999 the applicant was served with a notice of intended disciplinary enquiry. The enquiry sat and found him guilty.

RW2 told the court that he knew the applicant and that at some point in time the applicant was respondent's driver and he (RW2) was his van assistant. According to this witness his job entailed loading the truck and then delivering ordered goods at respective destinations in the chain stores.

At the chain stores his duties entailed off loading the goods as the driver called them in respect of the invoices he had. After off loading the items he would then take them to the shops. According to this witness there was no need for the driver to help him take the goods in the shop.

According to this witness sometimes at the beginning of September applicant was sent by RW1 to fetch him from the warehouse. On RW2's arrival RW1 told him the cause of the quarrel between the two of them.

According to RW2 the applicant confirmed that he had refused to drive the truck. After lengthy discussions the applicant eventually said he would drive the truck and leave it at its destination.

From the foregoing it is clear that the applicant was refusing to do his duties. According to RW1 this was the busiest time of the month. Chain stores such as the Shoprite Supermarket

and the Spar were very busy. It was of paramount importance, that the goods ordered be delivered promptly.

At common law the employee is obliged to keep his or her services available until the contract comes to an end, except, of course, during periods of authorised absence. Failure to do so constitutes a breach of contract which may entitle the employer to dismiss the employee summarily, i.e. without notice. Whether the refusal or failure is serious enough to warrant summary dismissal at common law depends on the circumstances, the question always being whether the refusal or failure constitutes a 'fundamental' or 'serious' breach.

Factors to be taken into account include the nature of employment, duration of the absence, actual or

potential prejudice to the employer, reasons for the absence and the employees state of mind.

From the evidence before court it is clear that the decision taken by applicant was very prejudicial to the respondents business. The applicant was employed to deliver food stuffs some of which are perishable. The timing was made to coincide with month end when the respondent's customers (the chain stores) are very busy.

It is the opinion of this court and one held by the two members that the respondent has been successful in proving that applicant's dismissal was fair and taking into account all surrounding circumstances of this case it was reasonable to terminate the services of the applicant.

Consequently the application is hereby dismissed. No order as to costs.

Members agree.

KENNETH P. NKAMBULE

JUDGE - INDUSTRIAL COURT