

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 151/1998

In the matter between:

DAN MANANA

APPLICANT

and

UNITRANS SWAZILAND (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: J. MAVUSO

FOR RESPONDENT

: M. SIBANDZE

JUDGEMENT

10 February 2003

The Applicant was employed by the Respondent in August 1987 as a heavy duty driver. He was in continuous employment until the 16th December 1997 when the

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Respondent terminated his services on allegations that he had stolen 123 litres of petrol, an offence committed at Mfekai in South Africa.

At the time of such dismissal, the Applicant was earning a weekly wage of E304.32.

The Applicant denied the allegations of theft stating that there was no evidence that he had offloaded petrol because the tanker was sealed. He admitted having made a five minutes stop at Mfekai but only to relieve himself and inspect the tanker tyres.

He claims the dismissal was unlawful and unfair in the circumstances.

He reported a dispute to the Commissioner of Labour. Efforts to conciliate failed and a certificate of unresolved dispute was issued on the 14th April, 1998. He was not paid terminal benefits upon dismissal hence he claims, one months salary in lieu of notice in the sum of E1,217.28, severance allowance in the sum of E4,212.00 and additional notice in the sum of E1,684.80.

Furthermore the Applicant seeks maximum compensation for unfair dismissal in the sum of E29,214.72.

The Respondent faced with the onus to prove that the dismissal of the Applicant was for a reason permitted by Section 36 of the Employment Act no. 5 of 1980 and that in terms of Section 42 (2) (b) it was fair and reasonable to dismiss the Applicant in the circumstances of the case called witnesses to prove its case.

The first was Trevor Mark Mangay a corporate investigator working for a South African company, Multinational Management Services. The witness told the court that he had ten years experience of corporate investigations and had obtained

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technical qualifications at the Pretoria Technikon. He was further trained by the South African Police in intelligence Work.

In respect of this case, he was mandated by the Respondent to investigate large fuel losses at the time on transit from Durban to Swaziland.

For starters, he obtained documentation from the Respondent reflecting the fuel losses. He and his colleagues formed an informal intelligence network, 30 kilometers North of Mtubatuba at a place called Mfekai where it was suspected illegal sales took place between the tanker drivers and illegal fuel operators.

The tanker tackographs had shown that the trucks regularly stopped at Mfekai, hence the suspicion.

The witness conducted surveillance work at close vantage points and obtained information from informers. He discovered illegal fuel depots that received fuel siphoned into 200 litres drums from passing trucks. The drums were placed in three sided rooms built for the purposes of truck entry, offloading and exit without turning around.

The witness personally purchased fuel from the illegal depot to establish their mode of operation.

On diverse dates, upon getting the trip sheets of the Respondents trucks, he monitored their movement and discovered that the trucks diverted into the illegal depots next to the highway at Mfekai and siphoned fuel into the drums and quickly drove away.

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The private investigators invited Police to join them in the investigations. As a result numerous operations were conducted side by side. The Respondent also issued a circular to all drivers not to stop at Mfekai area whatsoever.

Vital evidence on a number of drivers off loading fuel illegally at these illegal depots was obtained.

On the 24th September 1997 while he was conducting surveillance at Mfekai, a truck, fleet No. 4501 painted on its door and roof diverted from the highway at Mfekai and entered one of the illegal fuel depots. It offloaded fuel using a horse pipe mounted from the top of the truck into the drums and the truck quickly rejoined N2 Highway.

The trip sheet of fleet 4501 was produced before court and it reflected the truck was driven by the Applicant from Durban to Swaziland on the 24th September 1997.

The tackograph chart of the truck was also produced in court and it showed that the truck revs momentarily reduced to 600 (Six Hundred) per minute meaning that the truck made a stop though the engine was not switched off.

The depot was one and a half (1.5) to two (2) kms off the N2 highway. Neither the diversion nor the stop was recorded in the trip sheet.

The witness observed this diversion and offloading from a hidden vantage point at close range. He could not confront the Applicant then as it was an undercover project at the time aimed at netting as many drivers as possible who were involved in the syndicate. The area was also very dangerous to the extent

that when the investigators tried to approach to photograph the depots, they found armed youth

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with short guns and pistols guarding the premises and also acted as an early warning system. Shots were fired on more than one occasion. There was real danger of fire engulfing the entire village in the event the fuel was ignited.

The drivers of the truck, while in the rooms opened the top hatch of the tanker and used pvc piping to off load the fuel. The fuel flowed by gravity. Though the tankers had marked seals, the investigation revealed that the depot operators had replacement seals. Broken seals were recovered at the depot. This revelation made the investigators to believe that the management and security of the Respondent were involved in the scam since the trucks must have arrived with broken seals or with new seals bearing different serial numbers from those fitted at the depot of loading in Durban. They instructed the Respondent to check from their side why such malpractices went on undetected.

It was also discovered that the local Mfekai Police were turning a blind eye to the business. Police motor vehicle escorted one of the tankers to the illegal depot and followed it upon off loading fuel.

After uncovering the errant drivers to the satisfaction of the Respondent, the investigations were concluded. It was up to the Respondent to discipline the uncovered drivers. Thereafter with the help of the Police the illegal fuel operations were mopped up and their operations closed down. The fuel was removed. One depot was set alight by the operators as they flee. The investigators were shot at and one of their motor vehicles pushed off the road.

Under cross examination the witness was steadfast and consistent. He reiterated how he followed fleet 4501 driven by the Applicant, observed the driver climb the truck and insert a pipe and offloaded fuel into a drum. He observed the truck for

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about five minutes from the time it diverted from N2 highway into the illegal depot and then rejoined the N2 highway.

The witness did not testify at the disciplinary hearing but stated that the tackograph chart clearly corroborated his written testimony in that the truck stopped at Mfekai for about 3 minutes.

The Respondent's second witness was Mr. Sydney Simelane. He worked for the Respondent at the material time and one of his responsibilities was to ascertain quantities of fuel. He explained the storage tanks are calibrated to meet industrial standards. A dip stick is used to determine the quantity before and after off loading fuel from a tanker. The difference between the two represents the quantity off loaded.

When tankers are loaded with fuel electronic metres are used. The truck is then sealed. At the off loading depot there is a receiving clerk who ascertains whether the tanker has the correct product and inspects the seals to ensure they are intact He also verifies quantity in the storage tank as earlier explained.

The witness explained the various circumstances when there would be a variance between the quantity of the loaded product and the quantity off loaded. Temperature changes led to shrinkages and expansion of petrol. There are allowable limits for this loss. The allowable limit is .02 % of the consignment. The Applicant's variance was 123 litres (loss) for the consignment of 41,037 litres. According to the witness, 83 litres was the allowable amount in the case of the Applicant on 24th September 1997. He said the loss of 123 litres was beyond the allowable loss as per the company standards. The witness refuted the suggestion by the Applicant that the fuel spilt out from the tanker adding that such leakage would

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be a big risk to life, property and the business as a whole. If a tanker leaked therefore, under no circumstances should it be used.

Asked whether the measurement was accurate, he answered in the affirmative stating that a fuel tanker was a sophisticated equipment.

The witness was not in a position however to state whether the Applicant stole the fuel as alleged or not.

The Respondent also called Paul Samuel to testify in support of its case. He worked for the Respondent between 1992 and 2001 but at the time of the trial he was working for the British Petroleum company (BP).

At the material time he was the depot manager, fuel division at Matsapha. The report of the investigator (RW1) on the fuel theft at Mfekai was given to him. He corroborated the evidence of the investigator regarding the instructions to investigate the fuel losses and in particular concerning the instruction given to all drivers at the time not to stop at Mfekai whatsoever. The witness told the court that he had a lot of experience in reading tackographs and he took the court carefully through the chart explaining how the tackograph works.

From the chart, the Applicant at 17.40 hours made a 3-4 minutes stop at Mfekai contrary to written instructions not to do so by the Respondent. The truck was during the stop idling at 600 revs per minute meaning that the engine was not switched off. The witness explained that a driver of Applicant's experience could not embark from the truck to relief himself and check the tyres without switching off the engine. The Applicant's explanation was therefore highly improbable and was not true.

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The witness also dismissed the suggestion that some fuel would have been left in the tanker stating that while off loading, plus minus ten litres is always left in the tank and about 3-4 litres in the pipes. This factor is not considered because similar quantities are always left in the tank compartments. The 40 litres loss in excess of the allowable limit was unacceptable in the circumstances and served to corroborate the investiptor's report of theft at Mfekai.

The 3-4 minute stop at Mfekai was also not recorded by the Applicant in the trip sheet because he was aware he was not supposed to stop at Mfekai. This was in an attempt to conceal the stop but unfortunately the tackograph chart gave him away.

Furthermore, the truck had 26 tyres and it was not possible to check them in 3-4 minutes while the tanker was idling. After all, according to the trip sheet he had checked the tyres at Tongaat where he had made a 50 minutes stop. In the least, it would take him about 10 minutes to check the tyres.

The witness urged the court to reject the version of the Applicant as improbable and untrue.

The court visited the BP depot at Matsapha on the 5th November 2003 for an inspection in loco. We were able to see how the fuel is stored and measured in the storage tanks but the actual offloading was not demonstrated as there was no available truck. The court was satisfied that the procedures of measuring quantities were reasonably accurate and reliable.

Upon a careful analysis of the evidence before court, the court found that the evidence of RW1, RW2, and RW3 was largely unchallenged. RW1 in particular identified the truck driven by the Applicant on the material day and narrated how the driver of the truck entered an illegal fuel depot and siphoned fuel from the

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truck. The Applicant did not contest his presence at Mfekai on the material day, but only sought to give a

different explanation for the diversion. He did not record the stop at Mfekai in the trip sheet and the explanation that he had made the short stop while the truck idled to check tyres is incapable of belief given that the truck had 26 tyres.

The court accepts that the Respondent had given express instructions to drivers not to stop at Mfekai but the Applicant defied instructions and was promptly spotted by RW1.

The graphic details of the illegal operations at Mfekai and the close proximity RW1 had to the Applicant's truck at the time of the illicit operation leaves the court with no doubt that he had correctly identified the Applicant's truck and the off loading of the fuel.

The Respondent has in the whole established on a preponderance of probability that the Applicant had illegally off loaded fuel from the truck and was therefore dismissed for a reason provided under Section 36 of the Employment Act.

He was not the only driver caught stealing the fuel. The scale of the theft as described by RW1, RW2 and RW3 was threatening the contractual obligations of the Respondent to BP Shell. The menace had to be stopped and it took expensive and elaborate investigations to do so.

It was therefore fair and reasonable to dismiss the Applicant in the circumstances of the case.

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The application is dismissed with no order as to costs. The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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