IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 82/2002

In the matter between:

JACOB MAGONGO	APPLICANT
And	
SWAZILAND BUILDING SOCIETY	RESPONDENT

CORAM:

NDERI NDUMA :	PRESIDENT
JOSIAH YENDE	: MEMBER
NICHOLAS MANANA	: MEMBER
FOR APPLICANT	: P. R. DUNSEITH
FOR RESPONDENT	: ADV. P. FLYNN

JUDGEMENT-21 MAY 2004

This is an application for determination of an unresolved dispute brought to court in terms of Section 85 (1) of the Industrial Relations Act and the (Industrial Court Rules of 1984.)

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The dispute between the parties was declared unresolved by the Conciliation Mediation and Arbitration Commission (CMAC) and a certificate of unresolved dispute was issued accordingly on the 5th February 2002.

The dispute is one of unfair dismissal as expressed in the Particulars of Claim. Therein and before court in his testimony the Applicant asserts that he was employed by the Respondent on the 15th August 1999 as a teller. He was in continuous employment until the 24th September 2001, when his services were terminated by the Respondent on the grounds of poor quality work as per Article 5.2.1.22 of the Disciplinary Code.

It is alleged by the Applicant that the termination of his services was unlawful and unfair and unreasonable in the circumstances for the following reasons;

5.1 The appropriate sanction for a first offence of poor quality of work under Article 5.2,122 of the Disciplinary Code is a verbal warning noted. The dismissal was therefore unduly harsh and contrary to the referred to article.

5.2 The Applicant was not given prior notice that the offence with which he was charged could result in summary dismissal.

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5.3 The senior manager who dismissed the Applicant was not present at the hearing.

5.4 The Applicant was not furnished with the hearing report prior to his appeal despite requests and he was accordingly precluded from challenging the reasons by the chairman of the decision to dismiss him and;

5.5 No reason was advanced nor existed for summary dismissal.

The Applicant adduced evidence in support of the allegations aforesaid and claims reinstatement to his employment failing which payment of terminal benefits and maximum compensation for unfair dismissal.

At the time of the dismissal, the Applicant worked at the Manzini branch of the Respondent and earned a monthly salary of E2,929.99 (Two Thousand Nine Hundred and Twenty Nine Emalangeni Ninety Nine Cents).

The Applicant concedes that on the 24th August 2001 he experienced a shortage of E3,000 (Three Thousand Emalangeni) while working as a bank teller. It was a busy day as fully illustrated by the teller's transaction log.

He had noticed the shortage at the close of operations when the cash at hand failed to reconcile with the computer data, He notified his

supervisor Mr. S, N. Mamba who counter checked the figures with him and the shortage was confirmed.

He was at a loss as to how the shortage came about but upon looking at the day's transactions, he suspected that he may have overpaid one lady by the name of Josephine Ndzabukelwako. He told the supervisor Mr. S. N. Mamba of his suspicions. The customer had cashed over the counter a sum of E3,100.00 (Three Thousand One Hundred Emalangeni). At the time, he thought that he may have paid her sixty one notes of Emalangeni one hundred value thinking that they were fifty Emalangeni notes. This according to him was a mere speculation but was not presented as a fact of what had actually happened. The Applicant said he had a mind lapse and could not recall how he lost the money. No theft by him was suspected by the Respondent at all but he had for whatever reason been negligent on the day and had lost money.

The Applicant and the supervisor followed this lead and traced the customer Josephine Ndzabukelwako to her homestead. They both agree that she was hostile to them and denied having been double paid. It appears that the supervisor was satisfied that indeed this customer had not received the lost E3,000.00 otherwise the matter would have been reported to the Police to conduct an investigation.

No other possibilities as to how the loss may have occurred were presented by the Applicant at the time.

The supervisor Mr. S. N. Mamba initiated disciplinary proceedings against the Applicant on the 4th September 2001. In terms of the notice marked "A1" the Applicant was charged as follows:

"Nature of Alleged Transgression: poor quality of work - 52,1.22 of the Collective Agreement Hence on the 24th August 2001 it resulted on a cash shortage of E3,000.00 (Three Thousand Emalangeni only) at the close of operations."

The disciplinary hearing was scheduled to take place on the 10th September 2001. the hearing was presided over by one Mr. M. M. Mkhatshwa.

The minutes of the hearing are contained in a document marked 'A2-A4\ It was agreed that the said minutes were a summary of the proceedings as recorded by the presiding officer.
At the hearing the Applicant admitted the cash shortage and this was recorded as follows:
Mr. Magongo explained that he might have lost concentration while paying Ndzabukelwako client He explained that although the

specification on the voucher show E100's paid out he suspects that in his own mind he might have

thought he was using E50.00 notes and thus making a double payment in E100's".

It is clear from the recording of the presiding officer that Mr. Magongo did not offer the said explanation as the truth of what actually happened. It can be clearly inferred from the same that all he was saying was that he did not know how he had lost the money but this was one of the possibilities though other possibilities were not ruled out Mr. Magongo was however under pressure to try to remember what may have happened.

It is common cause that the Applicant had not lost money before nor had he been charged or warned for poor work performance or misconduct since he started working for the bank. Understandably he must have been shocked by the occurrence.

Mr. Mkhatshwa found the Applicant guilty as charged. In mitigation the Applicant stated he was a first offender. He recognized that the sum of E3,000.00 was large and had raised eyebrows but he said that his overall performance was good and this was a genuine mistake that required corrective measures to be taken to avoid repetition. His representative Mr. Myeni also echoed his words and in his closing remarks he asked for leniency to be exercised over the Applicant.

The findings of Mr. Mkhatshwa as contained in Form DH-1 were produced as exhibits A12-13. Apparently this report was not availed the Applicant until after he had left the employment of the Respondent. He was thus unable to use it in his appeal. Of most relevance in the report were the reasons why Mr. Mkhatshwa recommended to a senior manager that the Applicant ought to be dismissed. These may be summarized as follows:

1. Mr. Magongo was a very experienced teller and it was not acceptable for such a person to ignore both number of notes stated on the specification sheet displayed by the system and the total amount of the withdrawals.

2. The system, according to the attached copy of Josephine Ndzabukeiwako's withdrawal voucher, prescribed that the customer be paid in 31 (thirty one) E100 notes. If Mr, Magongo lost concentration as he claims he did and thought he was paying in fifties but was using E100 notes that would not have made any difference. The shortage means that he did not only get confused about the denomination he was paying in, but that he also ignored the count of notes specified by the system and paid 61 (sixty one) notes instead.

3. If he assumed he was paying in E50's then he should have paid out 62 notes not 61 causing the total pay out to be double the withdrawal but he paid 61 notes resulting in the difference of E3,000.00.

He concluded therefore;

nIt is my conclusion therefore that Mr, Magongos submission is a lie intended to exculpate him from serious disciplinary action".

From the aforesaid analysis, contrary to his own recorded minutes, Mr. Mkhatshwa took the speculation by the Applicant to have been presented as the truth of what actually happened. He concluded that the explanation was not plausible, therefore was a lie. This implies dishonesty on the part of the Applicant hence the recommendation.

The Applicant was not made aware of this so as to prepare for his appeal which he noted on the 29th September 2001 wherein he reasserted the speculation as to how he may have lost the money.

The Managing Director who presided over the appeal considered the written appeal and the submissions by the union representative and the report of the disciplinary hearing (which

the Applicant had not seen at the time) and confirmed the dismissal, He observed as follows:
" The information and your submissions if accepted means that you should have had a surplus at the end of the day. The teller operating system suggests to you how many notes of what denomination to issue. If you paid with E100 notes counting them as E50 notes as you allege, you would have issued 61 when the system required you to issue 31 notes of E100. This point is therefore rejected".

The Managing director echoed the findings of Mr. Mkhatshwa. It would appear therefore that the Applicant was primarily dismissed for offering a non plausible explanation for the loss of E3,000.00. The fact that it was a mere speculation as reflected in the minutes of the disciplinary hearing was ignored.

The question that comes to mind is this, what if the Applicant had offered no speculative explanation at all and said for example, " I honestly don't know how I lost the money". Would this have made a difference ?

An employer who dismisses an employee bears the onus of establishing on a balance of probabilities that firstly the offence for which the employee was dismissed is permitted by Section 36 of

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the Employment Act and secondly in all the circumstances of the case, it was fair and reasonable to dismiss the employee. The requirement is in terms of Section 42 (a) and (b) respectively.

In the attempt to discharge this onus the Respondent called several witness the first of whom was Samuel Dela Mamba (RW1). He was employed by the Respondent in 2001 as Relief Branch Controller and still held the same position. He was the supervisor of the Applicant on the 24th August 2001. The Applicant reported to him the shortage of E3,000.00 (Three Thousand Emalangeni). He checked the record of the day's transaction and confirmed the shortage of thirty (30) E100 notes.

The Applicant tried to recall how he could have lost the money and suspected that he may have double paid one customer by the name of Josephine Ndzabukelwako. She kept talking to him while he paid her and that it was the largest single payment by him over the counter for the day. She had cashed E3,100.00 (Three Thousand One Hundred Emalangeni) which was specified in the computer as thirty one notes of E100, He speculated that he may have paid 61 notes of E100.00.

The summary of the day's transaction was produced as exhibit C6 and the payment to the lady as exhibit C7.

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He told the court that he considered that the Applicant must have had a heavy lapse of mind to pay in the manner speculated and he thus considered the offence serious. He alluded that this was the highest amount the bank had lost in one transaction though they had recently experienced a loss of El,800.00 (One Thousand Eight Hundred Emalangeni).

The witness initiated the disciplinary proceedings against the Applicant per document 'A1' in terms of Article 5.2,1.22 of the Disciplinary Code.

The charge was for poor quality work and the prescribed sanction is as follows;

"Not unless more serious action is required:

1st offence - verbal warning noted. 2nd offence - written warning. 3rd offence - written warning. 4th offence - dismissal".

The witness told the court that the Applicant was a first offender. That as his supervisor and initiator he expected that the Applicant would receive a verbal warning and at worst due to the amount involved, a written warning. He said he would not have expected

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that the Applicant would be dismissed. This is why he initiated what is referred to in the code as a 1st stage disciplinary procedure not chaired by a senior manager,

Mr. Mamba confirmed that the Applicant had speculated on how he may have lost the money because he clearly could not remember how he had lost the money.

He emphasized that the Applicant was not suspected of theft at all hence he was neither searched nor was the loss reported to the Police.

He explained that cash loss by a teller could arise in different ways. He said that he was not aware of any teller who had been dismissed for cash loss for a first offence.

He acknowledged that a few weeks prior to this incident a teller by the name of Israel Mngomezulu had lost E1,800.00 and he had received a verbal warning. He however was not familiar with the circumstances of that case. He said that, that may have depended on the explanation given for the loss by the teller. He said it was better if a teller could remember how the loss occurred because this helps in recovering the money. In most cases the money was recovered. He said that he did not believe that the Applicant was dishonest.

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Finally the witness said that the case he had presented was that the Applicant could not recall how he had lost the money. He did not see the report of the chairman of the disciplinary hearing until he came to court.

Witness number two (RW2) was Moses Musa Mkhatshwa, the chairman of the disciplinary hearing. The document A2-A4 is the summary of the proceedings. From the minutes he recorded the explanation by the Applicant as follows:

"He explained that although the specification on the voucher shows E100's paid out, he suspects that in his own mind he might have thought he was using E50 notes and thus making a double payment in E100's".

In his report contained in document C11 dated 19th September 2001 he concluded as follows not withstanding the minutes aforesaid:

"If his submission that he assumed he was paying in E50's is to be accepted and he had somehow computed his own denomination count, he then should have paid out 62 notes not 61 causing the total pay out to be twice the withdrawal amount His paying out 61 notes resulting to the difference of E3,000 defies this logic and I do not have an alternative but to dismiss this submission as false.

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It is my conclusion therefore that Mr. Magongo's submission is a lie intended to exculpate him from serious disciplinary action".

He then recommended summary dismissal of the Applicant.

This finding is completely at cross purpose with the summary of the proceedings as recorded by the witness. An attempt to figure out how the loss of the money occurred was taken by the chairman to have been the Applicant's version of what actually happened.

The Applicant was then accused of perpetrating false hoods to protect himself. This finding is clearly not bom out of the minutes of the proceedings. That this finding was not made available to the Applicant to enable him prepare his appeal compounded the unfairness of the findings of Mr. Mkhatshwa.

The chairman of the appeal hearing bought the findings of Mr. Mkhatshwa hook, line, and sinker and confirmed the dismissal.

What is more startling is the production of a second set of hearing report dated the 24th September 2001. This version of summation is similar to the first one except that the findings that the Applicant concocted false hoods to exculpate himself is glaringly missing.

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In an attempt to explain this anomaly, Mr. Mkhatshwa told the court that the report dated 24th September 2001 was the one he had written first. Therein he found the Applicant guilty of poor quality work because "he could not account for the missing E100 notes, and moreover in his report he admitted that he might have thought he was using E50's and thus the difference was incurred. Day dreaming is not acceptable because it results in unnecessary mistakes".

In this report, he did not cast aspersions on the integrity of the Applicant and clearly his findings tally with the recorded proceedings. He told the court that the Senior Manager Mr. 3. C, Manana who dismissed the Applicant asked him to revise his findings hence he prepared the 2nd report wherein he accuses the Applicant of telling falsehoods and lies to avoid serious disciplinary action.

The letter of dismissal "C14" dated 24th September 2001 prepared by Mr. J. C. Manana does not refer to any falsehoods or lies told by the Applicant. He dismissed the Applicant for poor quality of work, due to failure to adhere to procedures. This offence squarely belongs to the category of offences under Section 36 (a) of the Employment Act. In terms thereof, it is fair to dismiss an employee because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him".

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This was clearly not the case with respect to the Applicant who admittedly had never before received a verbal warning nor a written one for misconduct or poor work performance.

Clause 5.2.1.22 of the Respondent's disciplinary code - poor quality work, clearly follows the dictates of Section 36 (a) of the Employment Act to give verbal warning for a first offence and a written warning for a 2nd offence and 3rd offence. Under this clause, a dismissal and not a summary dismissal could only be meted out after a 4th offence.

The phrase "not unless more serious action is required' could not have contemplated a summary dismissal for a 1st offence for poor quality of work. Mr. Mamba and the Applicant are both correct in asserting that a dismissal was completely out of their minds in respect of the offence committed by the Applicant.

If such result was contemplated by Mr. Mamba (the initiator) he should have charged the Applicant under a different category of offences under the disciplinary code and would not have initiated a stage 1 disciplinary action as he did in this case. Clause 2.4.1 cannot avail the Respondent at this late hour. This could only come into play where upon investigation by the line manager he decides to institute a stage three (3) disciplinary hearing chaired by a senior manager because dismissal may be the result.

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The 3rd witness (RW3) for the Respondent was Jabulani Lucas Manana the Area Manager - Manzini. He is the one who dismissed the Applicant after the recommendation by Mr. Mkhatshwa. He was according to his testimony not satisfied with the report dated the 24th September 2001 because it did not detail the reasons why Mr. Mkhatshwa recommended dismissal for the Applicant. He therefore asked him to prepare the 2nd report which is dated 21st September 2001. The fact that there were two different summations of the disciplinary hearing by Mr, Mkhatshwa is a dent on the bona fides and credibility of Mr. Mkhatshwa and Mr. Manana.

It is apparent that the 2nd report was deliberately prepared in hide sight to justify the dismissal and back dated to the 21st September 2001. Whereas the 1st report was dated the 24th September 2001. Bank officials deal with dates on a regular basis and it is hard to believe that Mr. Mkhatshwa had made an error in dating the two versions of his findings. This was done deliberately as was submitted

by Mr. Dunseith for the Applicant.

Advocate Flynn for the Respondent in his able and wide ranging cross examination capitalized on the fact that the Applicant did not actually know how he had lost the E3,000.00 to dent his credibility. At the hearing before court, the Applicant offered different possible explanations for the loss, such as that he may have paid 30 notes of

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E200 and then one E100 note. He tried to present the Applicant as a lying witness.

At all times, the Applicant maintained that he had no factual explanation of how the money got lost. After all this was a dear case of mind lapse leading to poor work performance.

The fact that the Applicant due to the lapse of the mind lost E3,000.00 and Israel Mngomezulu on the other hand lost El,800.00 is not by itself a justification under the Respondent's disciplinary code to dismiss the Applicant summarily and only visit Israel with a verbal warning. That this is what actually happened is common cause and the Respondent was challenged to call Israel Mongomezulu who was still working for the bank to show that his case was substantially different from that of the Applicant.

The Respondent is not only bound to adhere to Section 36 of the Employment Act but it is also obliged to comply with its own disciplinary code and in particular clause 5.2.1.22 thereof.
The Respondent failed in these both respects and has accordingly failed to show that it dismissed the Applicant for an offence permitted by Section 36 of the Employment Act.

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Given the work record of the Applicant in that he was an efficient teller and had no previous record of poor work performance, it was most unreasonable to dismiss him in the circumstances of the case. The fact that a fellow employee who committed a similar offence around the same time received a verbal warning illustrates the unreasonableness of the decision taken to dismiss the Applicant.

Mr. Mamba the immediate supervisor of the Applicant in not so many words, expressed surprise at the harsh sanction meted to the Applicant. He said he did not expect that would happen.

The Applicant is a young man with a young family. The Respondent had clearly stated that he was not dishonest but had a serious lapse of mind on the particular day.

No plausible reason as to why the Applicant should not be reinstated to his position or deployed to a similar post was offered by the Respondent. The court was told that these positions fall vacant from time to time and are subsequently filled.

Section 16 (l)(a) of the Industrial Relations Act No.1 of 2000 empowers the court in its discretion to order the employer to reinstate the employee from any date not earlier than the date of dismissal where it finds that the dismissal was unfair.

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From the facts of this case, the dismissal of the Applicant was both substantially and procedurally unfair because the reason for the dismissal was not permitted by Section 36 of the Act, and secondly the Applicant was not furnished with the findings of the disciplinary hearing to enable him prepare for his appeal. If this had happened maybe the findings of the Managing Director would have been different.

The Applicant had worked as a teller for 24 months. He was earning E2,929.99 at the time of his dismissal.

He was not paid any terminal benefits because he was summarily dismissed. He has suffered great hardship because his wife is also unemployed. He told the court that his first born is now at home due

to lack of school fees. His efforts to get alternative employment has failed.
Unemployment as is clearly the case here results in the worst kind of human degradation and suffering. This especially for a young man with a young family full of promise is hard to bear. It is for this reason that every employer should have a human face and tread with caution before meting out the ultimate sentence to a young employee. The effects often of such rushed decisions though might not be apparent at the time may equate to a death sentence in the field of industrial law.

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At the same time/ employees must value their employment. In today's age of massive unemployment a job in hand is a rare opportunity that should be jealously guarded by providing proper, efficient and diligent service to the employer. A contract of employment is unlike any other commercial contract, a life relationship that must be natured with care by both parties. Reciprocity is the key word because without the employees there would be no business and without the business there would be no employment.

In the circumstances of this case, the court deems it fit to order reinstatement of the Applicant from the date of dismissal. That he should be paid all arrear salary from the said date. The Respondent may in its discretion recover the sum of E3,000.00 (Three Thousand Emalangeni) lost due to the poor work performance of the Applicant and in addition issue the appropriate sanction of a warning in terms of its disciplinary code.

There will be no order as to costs. The members agree.

NDERI NDUMA JUDGE PRESIDENT

INDUSTRIAL COURT

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