

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 39/02

In the matter between:

JOSHUA MATSE

APPLICANT

And

FIDELITY SPRINGBOK

SECURITY

SERVICES (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA ;

PRESIDENT

JOSIAH YENDE ;

MEMBER

NICHOLAS MANANA :

MEMBER

B, ZWANE : FOR

APPLICANT

S. DLAMINI : TOR

RESPONDENT

JUDGEMENT-18 AUGUST 2004

The Applicant was an employee of the Respondent Security Company from 1997 to September 2001 when he was summarily dismissed for alleged insubordination in that he refused to honour an order from the Managing Director, Mr. Halgreen, on the 1st September 2001 to report for duty at the Matsapha Airport during the annual air show to provide security service.

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At the time of the dismissal the Applicant worked as a cash crew leader and earned a sum of E1, 157,00 (One Thousand One Hundred and Fifty Seven Emalangen) per month.

According to his testimony, a team comprised of two (2) security men and a driver. That the 1st September 2001 was a Saturday and ordinarily the cash crew worked from early in the morning until 11.00 a.m. when banks closed. On the material day, he and his team arrived at their duty station at 11.00 a.m. and were informed by Prince Maseko, the telephone controller that a manager by the name of Magagula had allowed them to knock off as there was no more work. The Applicant released his two (2) colleagues and he remained behind to await the arrival of a second cash crew. They arrived at around 11.30 a.m. and he duly informed the driver Mr. Ndlovu that they could also knock off. He stored the firearms before knocking off.

The Monday that followed was a holiday and so the Applicant decided to remove his uniform and wash it. At around 11.40 a.m. Prince informed him that the General Manager needed three (3) personnel. He told Maseko to ask Ndlovu and his team to go to Matsapha since he had released his men and, had washed his uniform. There was misunderstanding between himself and Ndlovu as to who should go. He wanted to drive the other motor vehicle to his home to pick a spare uniform. The General Manager spoke to Ndlovu over the phone and Ndlovu informed the Applicant that the General Manager wanted him.

While they discussed the matter, the General Manager called again and the Applicant picked he phone. He informed the Applicant that he was suspended from work and must go home.

The Applicant told the court that he was surprised by this, since he was off duty at the time.

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The Applicant was called to a disciplinary hearing the Friday that followed and the same was chaired by Mr. Ngubeni. The Applicant was represented by Mr. Fakudze. Before the hearing commenced he saw his file and it was marked "dismissal". He told Mr. Ngubeni that there was no need for a hearing, The complainant was the General manager himself.

The Applicant's witnesses declined to testify. Only company witnesses came. Three written statements by his witnesses were produced. The Applicant objected to delivery of a verdict before his witnesses were called. The protest was ignored and the Applicant received a letter of dismissal from Mr. Ngubane a few days later.

The Applicant did not appeal the decision because the General Manager who was the highest authority was the prosecutor.

The Applicant reported a dispute to the Commissioner of Labour. Conciliation, Mediation and Arbitration Commission (CMAC) failed to resolve the dispute and a certificate of unresolved dispute was issued thereof.

The Applicant at the time of the hearing was thirty nine (39) years old and had a wife and four children. He was still looking for alternative employment.

The Applicant denied that he had written a letter of apology to the General Manager stating that the hand written note shown to him was not in his hand writing nor was the signature on it his. At the time of the dismissal the normal work day was ten (10) hrs on a week day and 2 hours overtime but on Saturday the cash crew worked until the banks

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closed at 11.00 a.m. He denied having worked from 6 a.m. to 6 p.m. on Saturdays.

He explained that the cash crew worked with the banks and followed banks schedules. They did not have shifts like other security guards. When he worked as a guard's supervisor, he worked from 6 a.m. to 6 p.m. for six days a week.

In the year 2000, the working hours were reduced to 10 hours. It was then when he was transferred to the cash crew department.

In short the Applicant denied that he disobeyed the General Manager and states that he was dismissed unfairly when all circumstances of the case are taken into account.

The employer has the responsibility to show that the dismissal of an employee was for a reason permitted by Section 36 of the Employment Act and that the dismissal was fair in all the circumstances of the case.

In its endeavour to discharge the onus, the Respondent called Wilfred Ndlovu (RW1) to testify in support of the dismissal. Mr. Ndlovu told the court that he was an armored vehicle driver at the material time. He said that on the 1st September 2000, upon completing cash transportation, he reported at the Matsapha station.

While there, Prince Maseko told him the General Manager had instructed him to take all the personnel he had to the Airport. He had two (2) guards. When he informed the Applicant to join them he declined stating that the boss was crazy since it was mid-day. Ndlovu reported to Prince that the Applicant did not want to join them to the Airport. Prince reported the matter to the General Manager over the phone. Ndlovu told the court that he left Prince speaking to the General

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Manager and took his men to the Airport, The General Manager wanted four (4) men but three (3) of them went. Johannes Hlatshwako ran away when he was told about the instruction. He was dismissed.

Ndlovu told the court that although they were obliged to work from 6, a.m. to 6 p.m. on Saturdays, at times they were instructed to knock off early. On the material day, the Applicant and others absconded. They had not been permitted to go home.

At the Airport there was an Air-show and they controlled the crowds. He said under cross examination that the General Manager spoke to him directly on the phone before he left for the Airport.

He agreed that the security personnel could not work without uniform. At the time the new instructions came the Applicant's uniform was in a bag. He said he did not know whether Applicant had been released but had decided to wait for him to arrive. He agreed that in the change room there was a water tap and sink, but said that he did not see the Applicant wash his uniform.

Prince Maseko testified as RW2. He was the Telephone Controller. He narrated that on the 1st September 2001 at around 11.30 a.m. he received a call from the General Manager instructing him to tell the cash crew to go to the Airport.

The Applicant was one of them. He gave the message to the Applicant since he was the leader of the crew. The Applicant said he would not go because his uniform was dirty. Four men were required.

He gave the same message to Ndlovu's crew who had just arrived, Ndlovu was the crew leader of the second team and he asked the Applicant to join them,

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The General Manager called after some time to find out why there was delay. Prince reported to him that Applicant had declined to join the others who went. The General manager then suspended him from work. He told the court that he was senior than the guards,

He went on to say that at the time, the Applicant was wearing civilian clothes and his uniform was in a bag. He said that the station had no facility for washing clothes. He agreed further that on occasions, guards knocked off early upon release by the managers. He denied he had released the Applicant and his crew on the material day. He could not explain why the rest of the crew had left, if they had not been released.

He however insisted that non of the crew members had left at the time the instructions came through. Johannes Hlatshwayo ran away and was dismissed for that.

He said he could not recall whether the Applicant offered to go and collect his spare uniform, stating that he did not know that his uniform was wet as he did not see it.

The General Manager only spoke to the Applicant after he had suspended him.

The third witness for the Respondent was Joshua Ngubeni (RW3). He was the Operations Manager of the Respondent and had chaired the disciplinary hearing conducted for the Applicant.

He told the court that Applicant was charged with disobeying lawful instructions from his seniors. The Applicant was represented by a work colleague namely Lucas Fakudze,

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His witnesses were not present and the hearing was postponed to the 7th September 2001 to enable him to call them. The hearing was also shifted from Mbabane to Matsapha where his witnesses were stationed. On the day of the hearing, the witnesses declined to attend the hearing and opted to submit short written statements, The same were produced before court.

The General Manager testified as the complainant and he could not be called to the court hearing as

he is currently based at Ghana. The Applicant also had narrated his side of the story.

Mr. Ngubeni delivered a verdict that was submitted to court in a written form. He dismissed the Applicant upon finding him guilty for disobeying a lawful order.

Upon a careful analysis of the evidence by the Respondent's witnesses and that of the Applicant the court has found the following to be factual:

1. That the guards ordinarily worked from 6 a.m. to 6 p.m. (12hrs) for six days. That is from Monday to Saturday.
2. That the cash crew was occasionally released early by the Managers if there was no more work to be done.
3. That the cash crew transported cash to and from the banks and the banks at the material time closed at 11.00 a.m. on Saturdays.
4. That security guards as well as the cash crew could not perform their duties without uniform.
5. That on the 1st September 2001 the Applicant was a cash crew security leader. He had two security guards and had arrived at the station at Matsapha around 11.00 a.m.
6. That the Applicant as at the time the General Manager called for personnel to go to the Airport was in civilian clothing. His uniform was in a paper bag.

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7. That none of the Respondent witnesses checked to see if the uniform was wet or not.
8. That none of them could positively deny that the Applicant had asked to be given time to go and collect spare uniform at home since his was wet.
9. That the General Manager did not directly give instructions to the Applicant to go to the Airport nor did he listen to his story before he suspended him on the material day.
10. One cannot rule out the possibility that the Applicant had already washed his clothes.
11. Mr. Magagula, the manager who was said to have released the Applicant and his crew was not called to testify and no explanation for his absence was given.
12. Out of the crew of three (3) the Applicant and Hlatshwayo were dismissed for defying lawful instructions yet there was no explanation as to why the third member of the crew was not disciplined.

From the totality of the above the court has come to the conclusion that upon arrival at the station, the Applicant and his cash crew were informed that they could go home by Prince Maseko on instructions of Mr. Magagula. This explains why the Applicant had washed his uniform and one of his colleagues had gone home.

That no direct instruction was received by him from the General Manager and the explanation he gave to his colleagues for inability to join them was reasonable in the circumstances of the case. The General Manager missed a good opportunity to immediately get the facts from the Applicant on the material day and was out of order to suspend him without hearing his side of the story.

The evidence by the Respondent's witness appear to be orchestrated especially in denying that the Applicant had washed his uniform yet none of them had

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bothered to check if indeed that was the case. The court finds that these witnesses especially Prince and Ndlovu were not candid with the court on this issue.

The Respondent has in the circumstances of the case failed to prove that the Applicant was given a lawful order by the General Manager on the 1st September 2001 and that the Applicant had disobeyed the order.

Therefore the Applicant was not dismissed for a reason permitted by Section 36 of the Employment

Act. The dismissal was both substantively and procedurally unfair considering all the circumstances of the case outlined herein.

Though obeying orders in the security services is of essence and goes to the root of the business, orders by supervisors must not only be lawful but must be reasonable and capable of compliance.

An employee cannot be said to have defied an order that clearly he was not in a position to comply with. A security guard cannot be stationed at the busy Matsapha Air show if he is not in uniform. The Applicant had washed his uniform upon being given authority to knock off by a Line Manager. He ought to have been given opportunity to explain his predicament before he was inhumanely suspended on the spot.

As a consequence the Applicant lost his means of livelihood. To-date he has not gotten alternative employment. He and his family have suffered dire financial constraints.

Joblessness leads to humiliating experiences for a family provider and in most cases, outright dehumanization.

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Though the dismissal is the prerogative of the employer, it must be arrived at cautiously having ruled out alternative disciplinary measures.

Accordingly, the court orders the Respondent to pay ten (10) months salary as compensation for unfair dismissal of the Applicant in the sum of E11,157.00 (Eleven Thousand, One Hundred and Fifty Seven Emalangeni).

The Applicant having been summarily dismissed is also entitled to one months salary in lieu of notice.

Total Award E12,214.00

(Twelve Thousand Two Hundred and Fourteen Emalangeni).

The Respondent is to pay costs of the application taking the circumstances of the case into consideration.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT

INDUSTRIAL COURT

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