IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 52/2003

In the matter between:

JOSEPH SANGWENI **Applicant**

and

SWAZILAND BREWERIES **Respondent**

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: D. MSIBI

FOR RESPONDENT: M. SIBANDZE

J U D G E M E N T - 18/08/06

[1] The Applicant Joseph Sangweni was summarily dismissed from his employment by the Respondent Swaziland Breweries Limited on the 11th January 2002 after being found guilty at a disciplinary hearing on charges of:

- gross insubordination
- transgression of specified standing instruction.
- unauthorized possession of company property.

[2] The Applicant considered his dismissal to be substantively and procedurally unfair, and he reported a dispute to the Commission for Mediation, Arbitration and Conciliation (CMAC). The dispute could not be resolved through conciliation, and the Applicant then applied to the Industrial Court claiming reinstatement alternatively payment of compensation for unfair dismissal and terminal benefits.

[3] The Applicant was employed by the Respondent on 11th December 1989, and he had worked continuously for the respondent for a period of twelve (12) years when his services were terminated. At the date of termination, he was employed as a Labeller Operator earning the sum of E2,124.40 per month.

[4] The Applicant operated a machine which applied labels to beer bottles on a production line. On 19th December 2001 he worked the day shift from 07.00 - 16.30 hours. When he was about to knock off, the packaging manager one Moses Sikhondze approached him and requested that he work overtime on the next shift. The other labeling operator Themba Shongwe had been involved in an accident and could not work. There was to be a label changeover during the next shift, and the person standing in for Themba Shongwe did not know how to carry out the changeover. The Applicant was requested to work until the changeover had been successfully accomplished. It was anticipated that he would finish this work at about 22:00 hours.

[5] In terms of the applicable Collective Agreement, employees may be required by management to work overtime. However Section 11 (1) designates 2 hours per day as reasonable overtime, and stipulates that management's prerogative to announce such overtime is subject to 24 hours notice.

[6] The Applicant was requested to work five and a half hours overtime without any prior notice. He was not obliged to do so, and initially he refused. He was eventually persuaded to consent. The Packaging Manager drove him home to drop off some beverages that he had purchased, then returned him to the workplace. A promise was made by the Packaging Manager that at the end of the Applicant's overtime period, he would be transported to his home.

[7] According to the Applicant, the Packaging Manager gave him his cell phone number and instructed that he be called when the Applicant was ready to go home at about 22:00 hours. Moses Sikhondze in his evidence did not deny that this arrangement was made, but stated that the Applicant already had his cell phone number. Sikhondze confirmed that he promised to arrange transport home for the Applicant, and stated that he had sent instructions to the Packaging Supervisor to take the Applicant home when he finished the changeover.

[8] The Applicant duly attended to his overtime duties and completed the changeover at about 21:50 hours. He then called Moses Sikhondze so that he could be transported home as previously arranged. Sikhondze did not answer his cell phone. In his testimony, he explained that he left it in his car and he missed the Applicant's call.

[9] The Applicant then sought out the Packaging Supervisor, Vincent Nkonde, who was his supervisor on the night shift, to ask him to arrange his transport home. According to Applicant, Nkonde was uncooperative. He refused to drive him home in his personal vehicle because he said he would not be reimbursed by the company for the cost of fuel. He told the Applicant to wait at the gate and he would make arrangements for transport. The Applicant waited for about an hour without any word from Nkonde. On the advice of the security guards, Applicant then went to find out the position from Nkonde. Nkonde was not in his office, nor could he be located on the factory floor.

[10] The Applicant went to the plant and pressed the emergency button. This had the effect of immediately stopping the production line. The Applicant said his intention was not to stop production but to attract the attention of Nkonde and find a way to get home. He said that he believed Nkonde was deliberately avoiding him to evade the obligation to transport him to his home.

[11] Nkonde on the other hand testified that he was busy with his duties in the Plant, and he denied that he was "running away" from the Applicant. He confirmed that the Packaging Manager has sent him an instruction to arrange transport home for the Applicant, but he said the Applicant never reported to him when he finished the changeover. He insisted that the Applicant never asked him for transport, nor did he ever have any discussion with the Applicant about transport.

[12] Nkonde did not make a good impression on the court. His demeanour was shifty, and on important issues his evidence was evasive. His denial that he had a discussion with the Applicant about transport was contradicted by another witness called by the Respondent, one Mthini Dlamini. Dlamini testified that he overheard Nkonde arguing with the Applicant over transport. In the minutes of the Applicant's disciplinary hearing, EXH RA15, Dlamini is recorded as stating;

> *"I then overheard Vincent Nkonde arguing with Joseph Sangweni over transport, and that he (Sangweni) had taken the spacer as a means of sabotage since he had not been taken home yet, as per agreement."*

Mthini Dlamini's evidence in court was to the same effect.
On this issue, the court accepts the version of the Applicant and rejects that of Nkonde.

[13] Moses Sikhondze said in his evidence that he had given an instruction to Nkonde to transport the Applicant home. At the disciplinary hearing Sikhondze stated that he also instructed that Nkonde must raise a mileage claim and put it on his desk for processing the following day. It is clear from this evidence that Nkonde was instructed to personally drive the Applicant home, and he was told that he would be reimbursed for the travel costs.

[14] The court finds that Nkonde was well-aware of his duty to provide the Applicant with transport home, and that he shirked this duty. The excuse he made to the Applicant that he could not use his own car because he would be out of pocket was an outright fabrication, and indicates that he had decided to ignore the instructions of his manager regardless of the frustration and inconvenience caused to the Applicant. The Applicant's belief that Nkonde was thereafter deliberately avoiding him to evade his duty to take him home was justified in the circumstances.

[15] In judging the Applicant's subsequent actions it is important to keep the following factors in mind:

15.1. the Applicant had been at work for a continuous period of 16 hours by 23:00 hours;

15.2. he was due to return to work for the next days shift at 07:00 hours;

15.3. he had agreed to work overtime as an indulgence arid without any obligation to do so, at the plea of the packaging manager;

15.4. he had been promised prompt transport to his home as soon as he completed the changeover;

15.5. Vincent Nkonde had disdained the Applicant's request for transport and was deliberately avoiding him;

15.6. the Applicant was tired and stranded .

[16] In these circumstances, it is not surprising that the Applicant felt exploited and frustrated and was provoked into taking drastic action to draw attention to his plight by pressing the emergency button on the machine.

[17] The disciplinary charges against the Applicant which resulted in his summary dismissal all relate to the Applicant's alleged conduct *after* he pressed the emergency button. In its Reply, the Respondent states that the charge emanated from Applicant's conduct as follows:

"10.1 During the overtime shift, the Applicant's behaviour became irrational and Applicant, who was suspected to be under the influence of alcohol, removed a mechanical part from the production line causing production to stop.

46.3.1 *After being instructed to hand over the mechanical part to management he became belligerent and aggressive and refused.*

46.3.2 *He refused to submit himself to breathalyzer test.*

46.3.3 *He then left the premises, upon the Respondent indicating that it was calling the Police.*

46.3.4 *He left the premises with the mechanical part stopping production for an extended period.*

46.3.5 *A replacement for the mechanical part had to be manufactured."*

The Respondent's first witness Moses Sikhondze, the Packaging Manager, had no personal knowledge of these alleged events. He arrived at the workplace at about midnight to find production at a standstill. The Applicant had already left. Sikhondze was told by Nkonde that Applicant had removed a "spacer" from the labeling machine. The spacer is a plastic cylinder which ensures that a standard space is maintained between the two labels which are applied to each bottle by the "grippers" at the labelling stage of the production line. He said that the machine could not operate properly without the spacer. Sikhondze said that he personally confirmed that the spacer was missing from the machine, but he had no personal knowledge (apart from what he was told by Nkonde) as to who removed it. He instructed Mthini Dlamini to make a new spacer and he complied. Production recommenced about 30 minutes after he returned to the plant at midnight.

[19] RW2 Mthini Dlamini testified that he was on duty as a fitter at the Respondent's factory on the evening of 19 December 2001 when these events occurred. When the production line stopped, he went to ascertain the reason. He found Applicant and Nkonde arguing. From the conversation he gathered that Applicant had removed the spacer because he had not been taken home as promised.

[20] Mthini said Applicant produced the spacer, and the assistant labeller operator, one Elphas Dlamini, replaced it on the machine and switched on the machine. The Applicant then switched the machine off again.

[21] Mthini testified in chief that after switching off the machine, the Applicant again removed the spacer. However, under cross-examination, he was asked whether he saw the Applicant removing the spacer and he replied that he did not.

[22] The Court rioted the propensity of the Respondent's witnesses to describe incidents and events as if they had personally observed them, only for it to emerge that they were reconstructing events relying on hearsay. This was particularly the case with Moses Sikhondze and Mthini Dlamini, who were permitted to adduce hearsay evidence without any protest from Applicant's representative. Although the Industrial Court is not bound by the rules of evidence, hearsay evidence is intrinsically unreliable because it cannot be tested under cross-examination nor can the accuracy of the report or the veracity of the author be assessed. The court has been obliged to approach the evidence of these two witnesses with a certain degree of caution since their evidence was allowed to stray into facts outside their personal observation or knowledge.

[23] As an example of the need for caution with regard to Mthini Dlamini, one may compare his evidence as set out in paragraph 20 above with this extract from his evidence at the disciplinary enquiry:

"While still confused and shocked by this man's behaviour I was then approached by Vincent who told me to make a new spacer. I refused because Elphas Dlamini (machine operator) had told me that he had taken the spacer from Sangweni and put it back on the machine but Sangweni had taken it out of the machine again." (emphasis added).

[24] The court is left in the position of not knowing which aspects of Mthini Dlamini's evidence can be relied upon as facts within his own knowledge. Elphas Dlamini, who appears to have been the source of many of the facts from which events have been reconstructed, is deceased, and the veracity of the alleged reports made by him cannot be assessed.

[25] Vincent Nkonde was also called by the Respondent to describe the events concerning the missing spacer. It has already been noted that his demeanour as a witness was not impressive. As a supervisor also, his conduct left a lot to be desired. In the court's view, he was well aware that the applicant wanted to go home and was entitled to transport, and that the Applicant's conduct in switching off the machine was prompted by his (Nkonde's) neglect or refusal to arrange transport. Nkonde could have

resolved the situation then and there by agreeing to drive the Applicant home, or making some other immediate and satisfactory transport arrangement. Instead of doing so, he aggravated the Applicant's frustration by calling security to bring a breathalyzer, alleging that the Applicant was drunk, and then he returned to his office, leaving a very angry Applicant standing at the machine.

It is inconceivable that Nkonde honestly believed the Applicant to be under the influence of alcohol. He knew why the Applicant was angry and frustrated. He also knew the Applicant to be a man of short temper. It is beyond the Court's comprehension why he did not simply arrange transport instead of calling for security.

Nkonde also did not see the Applicant take the spacer. He was told this by Elphas Dlamini. Faced with yet another of his witnesses relying on hearsay, Respondent's counsel entered into this exchange with Nkonde:

"Q. *Did the Applicant ever deny that he took the spacer?*

A. I went to Elphas Dlamini because he told me Applicant took the spacer.

Q. Did he deny taking the spacer when you asked him for it?

A. He refused to give it to me."

As the high-point of the Respondent's case that Applicant removed the spacer from the machine, this evidence fall rather short of proof on a balance of probability, in the face of a vehement denial from the Applicant that he ever removed the spacer from the machine or refused thereafter to give it up.

In its Reply, the Respondent makes the averment at paragraph 11 that the Applicant did not deny the charges against him at the disciplinary hearing. With regard to the charges involving the spacer, this averment is not correct. The Applicant stated unequivocally at the enquiry that he did not take the spacer from the machine.

As to the Applicant leaving the Respondent's premises with the spacer in his

possession, Moses Sikhondze told the disciplinary hearing that the spacer was discovered at the plant the following morning. The Applicant stated that he never went to the plant in the morning. He went to Sikhondze's office, where he was suspended from work. The implication is that the Applicant had no opportunity to return the spacer to the plant, and it must have been there all along.

There is no direct evidence that the Applicant left the premises with the spacer in his possession. There is in fact no direct evidence that the spacer was ever in the applicant's possession, apart from Mthini's statement that he heard Nkonde and Applicant arguing because the applicant had removed the spacer. However, this argument apparently occurred before Elphas Dlamini took the spacer and put it back on the machine.

According to Nkonde, he called the security officer at the gate to bring a breathalyzer. When asked by counsel for respondent why he did so, he replied:

"Because the things that Sangweni was doing made me doubt that he was still okay."

The court does not consider that Nkonde had any bona fide belief or suspicion that applicant was under the influence of alcohol. Mthini Dlamini did not testify that he formed a suspicion that the Applicant was under the influence of alcohol, and Nkonde did not describe any observations he made that could have suggested alcohol-impairment on the part of the Applicant. On the contrary, Nkonde knew the reason why the Applicant was tired and upset, and why he stopped production, and he knew this had nothing to do with alcohol.

The Security Director Clement Dlamini eventually came to Nkonde's office with the breathalyzer and he and Nkonde proceeded to the plant. A stand-off then ensued. The Security Director asked to test the Applicant for alcohol and the latter refused. Surprisingly, the Security Director neither asked the Applicant for the missing spacer nor made any attempt to search hirn. According to the Applicant, the Security Director stood at a distance, and accused the Applicant of being drunk, and having no right to be at the plant at that hour. Such accusation added insult to injury, in the view of the court. Nkonde stood by and apparently made no attempt to explain the true reason for Applicant's behaviour to the Security Director.

In terms of the Factories, Machinery & Construction Works Regulations, the Security Director was empowered to arrest the Applicant, remove him from the factory and

hand him over to the nearest police station - if he suspected the applicant on reasonable grounds to be under the influence of alcohol. Clement Dlamini does not appear to have formed any such suspicion. He simply relied on the report of Nkonde that the Applicant was drunk. He made no attempt to verify this by approaching the Applicant. He did not testify that he observed any slurring of speech, staggering or any other indication that the Applicant was drunk. He was not entitled to administer a breath analyzer test unless he suspected the Applicant to be under the influence through his own observation. This is stipulated in the Respondent's Alcohol Policy regarding use of the breath analyzer (Exhibit RA 21). He was not entitled to rely on the judgement of Nkonde, which judgement as already observed was in any event tainted by malice.

The Security Director called the police, but by the time they arrived the Applicant could not be located. He had eventually left to find his own way home. He was not searched by the security at the gate, which is surprising if the Packaging Supervisor and the Security Director really believed him to be in possession of a vital machine part.

The following day, the Applicant was suspended. Disciplinary proceedings were subsequently instituted against him. No disciplinary action was taken against Vincent Nkonde, whose mischief had provoked the unpleasant events of the night.

The Respondent's Packaging Manager emphasized in his evidence that the emergency button should not be pressed simply to attract the supervisor's attention, since it brings production to a halt. This is undoubtedly correct, but the disciplinary charges against the applicant did not refer to his action in pressing this switch.

The first disciplinary charge was *gross insubordination.* Moses Sikhondze said this rose from Applicant's refusal to hand over the spacer to Nkonde. In other words, the charge is that applicant refused to obey an instruction from Nkonde to surrender the spacer.

It was never put to the Applicant in cross examination that Nkonde had instructed him to hand over the spacer and he refused. All that was put was that Mthini Dlamini overheard an argument between Applicant and Nkonde about the spacer. Applicant denied taking the spacer and denied that he argued with Nkonde about the spacer.

[41] Gross insubordination requires a refusal to obey a reasonable and lawful instruction. If the applicant never had the spacer, he could not obey a request to hand it over. It has not been proved to the satisfaction of the Court that the Applicant had the spacer in his possession, certainly not after the machine was stopped on the second occasion. According to Mthini Dlamini, the Applicant produced the spacer and surrendered it to Elphas Dlamini on the first occasion. No question of insubordination arises in respect of that particular incident. If there was a subsequent argument between Nkonde and the Applicant about the spacer, it is not clear whether this involved accusation and denial, or instruction and refusal. The Respondent has failed on a balance of probabilities to prove that Applicant committed the offence of gross insubordination.

[42] The second charge was that of *transgression of specified standing instruction.* Sikhondze explained that this arose from the Applicant's refusal to submit to a breathalyzer test for alcohol. For the reasons set out above, the Court is of the view that neither Nkonde nor Clement Dlamini had any reasonable ground for suspecting the Applicant to be under the influence of alcohol, and in those circumstances the Respondent's standing orders did not oblige the Applicant to submit to the test.

[43] The third charge was that of *unauthorized possession of company property.* This charge, according to Sikhondze, related to the Applicant's possession of the spacer.

The Applicant did not emerge unscathed from cross-examination. He denied prior disciplinary action against him which was clearly substantiated by documentary evidence. He also concocted an implausible story to suggest that Moses Sikhondze was jealous of his property holdings and had set up the disciplinary process to get rid of him out of motives of spite. Nevertheless, despite the imperfections in his evidence on peripheral issues, the Court considered that the Applicant's evidence was not shaken on the material issue regarding his alleged removal of the spacer. The Respondent failed to adduce convincing evidence that the Applicant removed and retained the spacer, or left the premises with the spacer in his possession. Without the evidence of Elphas Dlamini, the Respondent was unable to furnish an eyewitness account regarding the whereabouts of the missing spacer. Weighing the unsatisfactory hearsay reconstruction of events patched together by the Respondent's witnesses against the Applicant's denial under oath, the Respondent

has failed to discharge the burden of proof in respect of this charge also.

The court does not look favourably on employees who interrupt or sabotage production and cause loss to their employer. This amounts to "biting the hand that feeds you." The Respondent's Packaging Manager bewailed the production downtime of two hours on the evening in question. It has not been proved that the Applicant can be held responsible for this stoppage, but even if the evidence had been sufficient to prove the charges against the Applicant, the Court is of the view that the primary culprit and mischief maker was Vincent Nkonde. Furthermore, the downtime was prolonged for at least an hour due to Mthini Dlamini's refusal to manufacture a temporary spacer. That the Respondent chose to target the Applicant, and took no disciplinary action against Nkonde, and Dlamini, suggests a possibility of victimization. However the Court makes no finding in this regard.

With regard to the disciplinary process, there are a number of factors which compromised the procedural fairness of the disciplinary hearing:

46.1 The charges were amended on the day of the hearing. The amendment dispensed with a charge of threatening violence, but it also materially altered a charge of "misapplication of company property" to "unauthorized possession of company property".

The chairperson Ms. Ntsiki Kota did not afford the applicant any opportunity to consider or prepare for the amended new charge. She neglected her duty to ensure that the Applicant was not prejudiced in his defence by an amendment without prior notice.

46.2 The Applicant was never informed of his right to call witnesses, neither in the notice of the hearing nor at the hearing itself. The chairperson did not give him any opportunity or assistance to call witnesses, nor did she advise him of his right to do so. She also did not advise him of his right to cross-examine the witnesses called by the company. It was the duty of the chairperson to ensure that the Applicant was aware of his rights, and she was not

entitled to assume that he would be advised by the Human Resources Manager.

46.3 With regard to her decision to sanction the Applicant by summary dismissal, the chairperson committed certain irregularities which must undoubtedly have influenced her decision:

46.3.6 she entirely ignored the underlying reason for the confrontation on the evening in question. The failure of the company to transport the Applicant home after he had worked five hours overtime, in breach of the packaging manager's promise, was not regarded by Ms. Kota as a material or mitigating factor to be considered;

46.3.7 she regarded as an aggravating factor the fact that applicant's state of sobriety was in question and he refused to take a breath analyzer test when instructed to do so by the security director.

This is the very charge that the applicant was facing. The charge itself cannot constitute an aggravating factor.

46.3.3 Likewise, Ms. Kota found it aggravating that the Applicant refused to hand back the spacer when requested by his supervisor Nkonde. Again, the charge itself cannot be regarded as an aggravating factor.

(To illustrate this, one may take the example of a person convicted of an offence of theft. It cannot be an aggravating factor that he acted dishonestly, since this is an element of every theft. For aggravation, one must look to circumstances beyond the bare charge itself).

46,3.4 When testifying, Ms. Kota stated that she never considered the disciplinary transgressions committed by the Applicant in 1994 and 1995. She was compelled to withdraw this testimony when confronted by her own "summary of sentence" Exhibit RB22.

The respondent chose not to make available to the court its Disciplinary Procedure. In the absence of proof of any provision permitting the chairperson to take prior warnings more than six years old into account, the court considers it unfair that the

chairperson appears to have given full effect to warnings that had long expired. Ms. Kota's denial that she considered the Applicant's previous disciplinary offences suggests that she also believes she erred in doing so.

[47] In the Court's view, a reasonable and impartial chairperson who was not influenced by irrelevant considerations, and who gave proper weight to the surrounding circumstances of the offences and the Applicant's length of service, would not have considered it fair and reasonable to summarily terminate the Applicant's services.

[48] The Applicant appealed against his dismissal. An appeal hearing was duly convened, but the Respondent did not serve notice of the hearing on the Applicant. In his absence, the appeal was dismissed. A fair disciplinary process includes the right to appeal to a higher level of management.

See **Rvcroft: Guide to SA Labour Law (2nd Ed) page 208.**

The applicant was denied his right to an appeal.

[49] For the above reasons, the court holds that the termination of the Applicant's services was substantively and procedurally unfair.

[50] The Respondent's counsel has submitted that even if the court finds that the dismissal of the Applicant was unfair, it is not appropriate for the Court to simply substitute its own decision for that of the employer. Before it may do so, counsel says the Court must be satisfied that no reasonable employer in the same circumstances could reasonably have come to the same conclusion i.e. that the dismissal was appropriate.

[51] In support of this submission, counsel refers to the English case of British Levland (UK) Ltd v Swift 1981 IRLR 1991

This is indeed the approach of English law, based on its own statutory and common law. In our jurisdiction, and in other local jurisdictions, the "reasonable employer test" has been rejected to the extent that it prevents the court from arriving at its own

conclusion on the facts surrounding a dismissal.

Central Bank of Swaziland vs Memory Matiwane (Industrial Court of Appeal Case No. 11 of 1993)

Swaziland United Bakeries vs Armstrong Dlarnini (Industrial Court of Appeal Case No. 117 of 1994)

Rycroft: A Guide to SA Labour Law (2nd Ed) 197-198

[52] The reasonable employer test is still sometimes applied to determine the appropriateness of the employer's disciplinary sanction i.e. would a reasonable employer have imposed the same sanction in the same circumstances? This question was answered in paragraph 47 above.

[53] In the view of this Court, the respondent has failed to discharge the burden of proving that the Applicant was dismissed for a fair reason. Further, the sanction of the dismissal applied by the chairperson of the disciplinary hearing was tainted with irregularities, as set out in paragraph 46.2 above, and the dismissal was unreasonable in all the circumstances.

[54] It remains for the court to determine what remedy should be awarded to the applicant in the circumstances. The Applicant is fifty four years of age. He is married and he has seven children. He worked for the Respondent for twelve years. His occupation as labeler operator is job-specific, and he is unlikely to find any alternative employment where his skills are valued. He is in fact still unemployed, some four years after his dismissal. Apparently he has invested wisely in rentable accommodation, which has provided him with income during this period. He applied to the Court for reinstatement, and persisted in this prayer at the trial.

[55] Ms. Kota stated in her testimony that it would be impracticable to reinstate the Applicant. He has been away from the company for a period of four years, and his position has been filled. No other positions are available for him to occupy. The Court has reluctantly come to the conclusion that it would not be practicable to reinstate the Applicant, in view of the length of time that has elapsed since he left his employ. It is most regrettable that cases take so long to reach trial that the Industrial Court is almost always faced with the impracticability of reinstatement, notwithstanding that reinstatement is the primary remedy provided by the Industrial

Relations Act for unfair termination of services.

[55] Taking into account the circumstances of the events giving rise to the dismissal and the conduct of all parties involved, including the Applicant; the Applicant's employment record and length of service; the Applicant's personal circumstances and the degree of hardship suffered by him arising from his unfair dismissal; and the minimal prospects he has at this stage of obtaining future employment in view of his age, his skills, and the current state of our economy, the Court considers that an award of nine (9) months salary would be fair compensation to be awarded to the Applicant. Applicant is also entitled to be paid his notice, additional notice, and severance allowance.

[56] Judgement is entered against the Respondent in favour of the Applicant for payment as follows:

Notice pay	E 2124-40
Additional notice pay	E 3595-15
Severance allowance	E 8987-85
Compensation	E19119-60
TOTAL AWARD	**E33827-00**

There is no order as to costs.

The members agree.

P.R. DUNEITH

PRESIDENT OF THE INDUSTRIAL COURT