

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 280/2001

In the matter between:

ABEL KUNENE

Applicant

and

SWAZILAND SECURITY GUARDS (PTY) LIMITED

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: S. DLAMINI

FOR RESPONDENT: B ZWANE

J U D G E M E N T - 28/8/2006

[1] The Applicant Abel Kunene was employed by the Respondent Swaziland Security Guards (Pty) Ltd on the 24th February 1998 as a security guard. He was in the continuous employ of the Respondent until he was summarily dismissed on the 4th July 2001.

[2] The Applicant made a complaint to the Labour Commissioner under Section 41 of the Employment Act, 1980. Despite conciliation the complaint could not be resolved. The Labour Commissioner filed a report which declares the dispute between the parties unresolved.

[3] In its Reply, the Respondent pleaded that the Applicant had been fairly dismissed for assaulting his fellow employees and behaving violently at work. The Respondent pleaded that the Applicant was given a hearing before his dismissal

[4] The Applicant testified regarding the events leading to his dismissal. He was a guard in the banking department, responsible for the security and banking of the Respondent's own revenues. In early June 2001 on a weekend, another guard called Mkhosana Sigwane absented himself from work claiming to be sick. In the absence of the branch manageress, the applicant had to arrange a substitute guard to perform Sigwane's duties. On the Monday, he reported Sigwane's absence to the branch manageress, one Betty Groening. There was a suspicion that Sigwane was faking his illness. The manageress called Sigwane to report to work. Sigwane later accused the Applicant of "gossiping" about him to the manageress, presumably believing that Applicant had accused him to the manageress of malingering.

[5] Shortly after this incident, the Applicant went on his annual leave. He had applied for a loan which had not been granted by the time he left. He telephoned on the 19th June 2001, and it was confirmed that the loan had been granted and he could fetch the money from the Mbabane branch office.

[6] When Applicant arrived at the office, the branch manageress Betty Groening was present. He also found Sigwane present. Apparently Sigwane had been appointed to take his place in the banking department whilst he was on leave.

[7] In his evidence in chief, the Applicant said Betty Groening accused him of gossiping about Sigwane, and this led to a quarrel. Under cross-examination, he changed his evidence to say Betty accused him of telling people that she took bribes to give jobs to people. She said that this is what Sigwane had told her.

[8] Whatever the reason, a quarrel arose between the Applicant, Betty and Sigwane, which culminated in Betty calling the Police and laying a charge of assault against the Applicant. The Applicant however denied vehemently that he assaulted her.

[9] According to the Applicant, he was taken before the Swazi National Court on the following day. Betty wanted to withdraw the charges but the Police refused. He was then acquitted by the court.

[10] The Applicant completed his leave and returned to work on 4th July 2001. On the same day he was called to the head office in Manzini. The General Manager Mr. Fawcett showed him a written report from Betty, and said he had no option but to terminate his services. He was then summarily dismissed. He said he was not given the chance to defend himself.

[11] The Applicant's representative did not call any supporting witness. After he closed his case, the Respondent called Betty Groening to testify.

[12] Betty testified that she had worked for the Respondent as branch manageress for 32 years. She confirmed that the Applicant came back from leave to fetch his loan money. She said after some discussion he started assaulting her. The other people in the office tried to intervene. He then assaulted Sigwane also. She could not remember what they were talking about that caused the Applicant to assault her. The Applicant tried to punch her face, but she fended him off so that he only managed to hit her hands and arms.

[12] Betty said she called the Police, and she also reported to the General Manager, who said that the Applicant would have to be dismissed. When the case went to court, she told the court that Applicant had been dismissed and that was enough. She denied that she withdrew the charges. She said the Applicant was convicted, but the court let the Applicant off with a caution.

[13] According to Betty, the Applicant was called to a disciplinary hearing in Manzini by Mr. Fawcett. She attended with Sigwane and Mzwandile Motsa to testify. The chairman of the hearing was one Raymond Mndzebele. The Applicant apologized, and Fawcett then dismissed him. She said the reason the applicant was dismissed was because he assaulted her and Sigwane in the office.

[14] The Respondent did not call any other witnesses. It was explained that Sigwane was later dismissed from the company and could not be found; Mzwandile had died;

and Mr. Fawcett has left the country. No reason was given why Raymond Mndzebele could not be called. Apart from Sigwane and Mzwandile, a certain Mtsetfwa was also present at the quarrel on the 19th June 2001, according to the uncontradicted evidence of the Applicant - yet Mtsetfwa was not called as a witness. The Respondent failed to produce the record of proceedings in the Swazi National Court. The Respondent also does not appear to have taken serious steps to locate and subpoena Sigwane as a witness.

[15] The court is left with the task of weighing two contradictory versions without any other evidence in support of either version.

[16] Neither the Applicant nor Betty Groening were entirely satisfactory as witnesses. The Applicant's evidence was rambling and sometimes disjointed, but this can be ascribed to a lack of sophistication rather than unreliability.

[17] On two issues, the Applicant's evidence was inconsistent with the report he made to the Labour Commissioner.

17.1. In the report, he said that Betty rebuked Mkhosana Sigwane for pretending to be sick. In his evidence he denied that Betty rebuked Mkhosana.

17.2. In the report, he said Betty accused him of gossiping that she gave employment to people from her home area.

In his evidence, he said the quarrel on the 19 June 2001 arose because Betty accused him of gossiping that she took bribes to employ people.

[18] Betty Groening also gave inconsistent evidence. She denied that she wanted to withdraw the criminal charges against the Applicant, and denied that the Applicant was acquitted by the Swazi National Court. Yet the Respondent's Reply did not deny that Applicant had been acquitted, and expressly stated that "Betty decided not to pursue the criminal charges."

[19] Betty's recollection of important events was vague or non-existent. The court found it improbable that she was unable to recall the reason for the quarrel that, according to her, resulted in the Applicant assaulting her. The court believes that her

memory lapses were selective to avoid placing herself and/or the Respondent in an unfavourable light. Betty said she made a contemporaneous record of the events on 19th June 2001, but this record was not produced in evidence. The Respondent also failed to produce any documents relating to the alleged disciplinary hearing or the dismissal of the Applicant.

[20] Neither the Applicant nor Betty Groening can be said to be a superior witness whose evidence should be preferred. If anything, the Applicant was the better witness.

[21] On the material question as to whether the Applicant assaulted Betty and Sigwane, the onus of proof rests squarely on the Respondent in terms of Section 42 of the Employment Act, 1980 (as amended

*"Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false" - per **Wessels J. A. in NEMGIA v Ganv 1931 AD 187 at 199***

The court in this case is not satisfied that the version of Betty Groening is more probably true than that of the Applicant.

[22] Moreover, where one party alleges that another committed conduct of a criminal nature, such as assault, such conduct will not be lightly inferred or assumed.

"...the reasonable mind is not so easily convinced in such cases because in a civilized community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."

Gates v Gates 1939 AD 150 at

The court finds that the Respondent has failed to prove that the Applicant is guilty of assault or violence towards his fellow employees.

The Respondent also led no evidence to show that it was reasonable, in all the circumstances, to terminate the services of the Applicant. Even if the Applicant did assault Betty Groening as she alleges, the only evidence as to the reason for such assault came from the Applicant: to wit, he was falsely accused of gossiping and spreading malicious rumours about Betty and Sigwane. No assault can be justified,

but an assault provoked by insults does not necessarily lead to the dismissal of an employee, particularly where no injury was caused and the employee has a clean service record.

In terms of Section 42 of the Employment Act, the services of an employee shall not be considered as having been fairly terminated unless the employer proves-

27.1 that the reason for termination was one permitted by section 36; and

27.2 that, taking into account all the circumstances of the case, it was reasonable to terminate the service of an employee.

[26] The court finds that the Respondent has failed to prove that the termination of the Applicant's services was substantively fair.

[27] Regarding the disciplinary process, the evidence reveals the following serious defects:

27.3 the Applicant was not given proper notice of a disciplinary hearing;

27.4 the Applicant was not formally notified of the charges against him prior to the hearing;

27.5 the Applicant was not advised of his right to be represented by a fellow employee or union representative at the hearing, nor given any opportunity to obtain a representative;

27.6 the Applicant was not advised of his right to call witnesses nor was he given any opportunity to do so;

27.7 the outcome of the hearing was determined by Mr. Fawcett, the general manager, even though he was not the chairman;

27.8 Mr. Fawcett had already decided to dismiss the Applicant before the hearing, and without hearing the Applicant's side of the story;

27.9 the Applicant was not given the opportunity to appeal to a higher authority;

27.10 the Applicant was not given written notice of termination of his services.

[28] The court finds that Respondent has also failed to prove that the termination of the Applicant's services was procedurally fair.

[29] The Applicant is entitled to be paid the following terminal benefits as claimed by him:

Notice pay	E 831.50
Additional notice	E 255.85
Severance Allowance	E 639.61
Leave Pay (5.5 days)	E 175.89
	E 1,902.85

[31] The applicant is 42 years of age. He is married with three children. He has obtained temporary employment. He worked for the Respondent for three years. Betty Groening suggested that he had once been disciplined for fighting with one Makhosini, a fellow employee, but there was no evidence as to when this incident took place or what sanction was imposed.

Taking into account all the Applicant's personal circumstances and accepting that he quarreled with his branch manageress without showing proper restraint, the court considers that a fair award of compensation for unfair dismissal would be eight **(8)** months salary, amounting to **E6.652.00**.

[31] Judgement is accordingly entered against the Respondent for payment to the Applicant of the total amount of **E8.554.86**.

There is no order as to costs.

The members agree.

P.R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT