

**IN THE INDUSTRIAL COURT OF SWAZILAND**  
**HELD AT MBABANE**

**CASE NO. 93/2002**

In the matter between:

**SIPHO MANANA**

**APPLICANT**

And

**SWAZILAND RAILWAY**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE: ACTING JUDGE**

**DAN MANGO: MEMBER**

**GILBERT NDZINISA: MEMBER**

**FOR APPLICANT: MR. S. MADZINANE**

**FOR RESPONDENT: MR. S.M. SIMELANE**

**JUDGEMENT 12.09.06**

[1] This is an application for determination of an unresolved dispute brought by the applicant against the respondent in terms of the

Industrial Relations Act No.1 of 2000 (as amended).

[2] The applicant is a former employee of the respondent. In his papers he stated that he was employed by the respondent on 01.11.84 as a labourer. In 1995 he was promoted to the position of security officer.

[3] He further stated that on or about 23.06.99 his service was terminated by the respondent on allegations of dishonesty, disobedience and gross negligence.

[4] The applicant now wants the court to order the respondent to pay him the following benefits and compensation for unfair dismissal:-

**a) Payment of E2,170.00 in lieu of one moth notice**

**b) Payment of E4,339.92 in lieu of additional notice**

**c) Payment of £10,849.80 in lieu of severance allowance**

**d) Payment of £4,173.08 in lieu of outstanding leave days(50)**

**e) Payment of E26,040.00 as compensation for unfair dismissal**

[5] The respondent in its replies averred that the applicant's service was terminated after a properly and duly constituted disciplinary enquiry found him guilty dishonesty, disobedience and gross negligence. The respondent further stated that the applicant's service was terminated in accordance with section 36(b) of the Employment Act of 1980.

(6) The court will point out that that the applicant's application was not professionally drafted. There were no objections raised by the

respondent however. The court will therefore proceed on the basis that the basis of the applicant's claim was understood by the respondent.

[7] The applicant was the only witness for his case. On behalf of the respondent two witnesses testified.

[8] The evidence led before the court revealed that the applicant was first employed as a labourer in 1984. He was promoted in 1995 and was made a security officer. Whilst going to work in December 1998, he found a firearm. The firearm was an AK47 and had fifteen rounds of ammunition. He took the firearm to work and kept it in a drawer in an office.

[9] The firearm was recovered on the following day before 12:00 noon. The applicant was fetched from his room by a soldier and a game ranger. He went to the office or guardroom where he retrieved the firearm and the rounds of ammunition from the drawers.

[10] The applicant was arrested. He spent three months in custody. The trial did not however proceed and he was released. He came back to his work place to resume his duties.

[11] He was on 23.04.99 served with a notice of a disciplinary hearing, which was to take place on 04.05.99 at Mpaka. The applicant was based at Siweni.

[12] The applicant was charged in terms of regulation 61 of the respondent's regulations. The said regulation was not however

made available to the court.

[13] On count 1 the applicant was charged with concealing the presence of an arm of war within the respondent's property knowing the said possession was illegal and that that was an act of dishonesty. In the alternative he was charged with dishonesty in concealing knowledge of the possession of an arm of war and ammunition by a fellow employee.

[14] In count 2 the charge was that he failed to enter in the security occurrence book the discovery of an arm of war.

[15] In count 3 the charge was that he endangered the safety of the Railway and persons employed or resident on the respondent's property in that he illegally kept an arm of war and thirteen live rounds of ammunition.

[16] The applicant was found guilty as charged and was summarily dismissed. He appealed and the appeal was dismissed.

[17] Before the start of the disciplinary hearing, the applicant objected to the chairman hearing the matter. The chairman was RW1, Joseph Mlambo. The chairman was asked to recuse himself. The objection was dismissed by the chairman.

[18] The basis of the application for the chairman's recusal was that he was in a supervisory position to the applicant and therefore was not going to be impartial. RW1's argument was that although he was in a supervisory position to the applicant, he was not however his immediate supervisor.

[19] The applicant also told the court that he objected to RW1

being the chairman because he was not treating him well. The applicant told the court that RW1 refused his application for a transfer from Siweni as he was prone to Malaria on three occasions, and RW1 told him that he would die there.

[20] After RW1 had refused to recuse himself, the applicant and his representative stormed out of the meeting. The hearing proceeded in the absence of the applicant or his representative.

[21] From the record of the disciplinary hearing, it is not clear whether the applicant did raise the second ground for the chairman's recusal. The record only shows that the chairman's response was that he saw no reason for him to recuse himself, as he was not the immediate supervisor of the applicant.' The most disturbing aspect of the matter however is what appears on page six of the record indicating the chairman's response.

[22] The following appears on that page as the chairman's response to the application for recusal.

*"7776 chairman is not the accused employees' immediate supervisor and not even Head of the Security Section. His impartiality is further assured by the fact that he was not involved in the investigation of the matter, but the captain at Mpaka to whom the accused report.*

*His knowledge of the matter is through the reports he was given on appointment as chairman of this inquiry".* (my underlining).

It seems therefore the applicant's objection was justified. If the chairman had knowledge of the matter prior to the hearing, he was not qualified to sit as chairman of the hearing. His failure to recuse himself was therefore clearly a procedural irregularity.

There was no dispute that the firearm was found in the guardroom or office of the respondent. There was also no dispute that it was put there by the applicant. The applicant's defence was that he had not hidden the firearm but had kept it there because he felt it was a safe place. He said his intention was to report it to the goods train personnel when the train came. The applicant said he did not breach any regulations by not recording the firearm in the occurrence book as he had found the firearm outside the premises of the respondent.

As already pointed out, the respondent's regulations being relied upon were not produced in court. During cross-examination RW1 conceded that the duty imposed on the guards was to record items found within the premises of respondent. RW1 told the court that there was a duty to record the firearm as the applicant had brought it within the respondent's premises. He failed however to cite any regulation providing for that.

The court will accept the applicant's version that there was no duty imposed on him by the regulations to record items found outside the respondent's premises. The evidence that the firearm was found outside the respondent's premises was not in dispute.

The applicant further told the court that there was no means of communication at Siweni. He said the nearest police station was about thirteen kilometers away. During cross-examination RW1 first said there was a means of communication there. He however later agreed that that was only an assumption on his part.

No other witness was called by the respondent to prove that there were some means of communicating at Siweni. The applicant's evidence therefore remains intact. It cannot therefore be said that

the applicant was negligent in failing to report the firearm within a reasonable time.

The applicant said he had kept the firearm in the cabinet so that he could report it to the train drivers when the train arrived. From the manner that the applicant dealt with the firearm, the court is unable to reach a conclusion that he had ill intentions. If the applicant had other intentions other than to safely keep the gun until he reports it to the train drivers, he would simply have taken it to his room to hide it there or just hide it in the bushes.

Furthermore, when he was asked to go and retrieve the firearm, he did so without hesitation or resistance. Such a conduct was clearly not consistent with someone who knew that he had committed a crime or had done something wrong.

The court will therefore come to the conclusion that the applicant was wrongly found guilty of the charges that he was facing.

[32] On the evidence presented before the court, the respondent has failed to prove on a preponderance of probabilities that the applicant was fairly and lawfully dismissed in terms of section 36(b) of the Employment Act of 1980, as it has failed to prove that the applicant was guilty of any act of dishonesty. The respondent has also failed to prove on a balance of probabilities that the applicant breached the provisions of regulation 61 of its regulations.

[33] In terms of section 42 (2) of the Employment Act of 1980, the duty to prove that an employee was fairly terminated rests with the employer. The respondent employer in this case has failed to discharge that burden of proof.

[34] The applicant's application therefore succeeds.

[35] The applicant is forty-one years old. He has two wives and ten children. The youngest is two months old. His wives are not employed.

[36] The certificate of unresolved dispute shows that several conciliation meetings were arranged but the respondent failed to turn up. The reasons stated therein are that the respondent's officer who was assigned the matter was indisposed and a replacement could not be found. The court finds that that was clearly a very flimsy excuse for a company as big as the respondent and is unacceptable. The court will show its disapproval of the respondent's conduct of frustrating the applicant by an order for costs in terms of prayer f) for further or alternative relief.

[37] Taking into account all the above, the court will make an order that the respondent pays the applicant the following terminal benefits:-

**1.**

- |                                 |                   |
|---------------------------------|-------------------|
| <b>a) Notice pay</b>            | <b>E 2,170:00</b> |
| <b>b) Additional Notice Pay</b> | <b>E 4,339:92</b> |
| <b>c) Severance Allowance</b>   | <b>E10,849:80</b> |
| <b>d) Outstanding Leave</b>     | <b>E 4,173:08</b> |

**2. The respondent is also ordered to pay the applicant (E2,170:00 x 12) E26,040:00 as compensation for unfair dismissal.**

**3. The respondent is also ordered to pay the costs of the**



**application.**

The members agree.

**NKOSINATHI NKONYANE AJ.**  
**INDUSTRIAL COURT**