

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 235/02

In the matter between:

ABSALOM MAVUSO & 12 OTHERS

APPLICANT

And

**SINKHWA SEMASWATI LTD T/A
MR BREAD BAKERY**

RESPONDENT

CORAM:

NKOSINATHINKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANTS: R. NDLANGAMANDLA

FOR RESPONDENT: M. NKOMONDE

JUDGEMENT 12.11.08

[1] This is an application for determination of an unresolved dispute brought by the applicants against the respondent in terms of the provisions of the Industrial Relations Act of 2000 as amended.

[2] The applicants are former employees of the respondent. The respondent is a company that is involved in the bakery business. The applicants claim that they were unfairly and unlawfully dismissed by the respondent. They are now praying that the court issues an order that they be paid their terminal benefits and also that the respondent be ordered to compensate them for unfair and unlawful dismissal.

[3] The respondent denies that the dismissal of the applicants was unfair and/or unlawful. In its Reply the respondent stated that the dismissal of the applicants was justified and therefore fair and lawful as they were found guilty of having defied an instruction from their supervisor and also of having left their work station before clock-out time.

[4] Three witnesses testified in court on behalf of the applicants, being Mbuso Dlamini, Absalom Mavuso and Mthokozisi Dlamini. Three of the applicants being Mkhumbuleni Vilakati, Makhosonke Maseko and Nkosinathi Maziya appeared before the court and confirmed the evidence of the three witnesses. By agreement between the parties four of the applicants filed confirmatory affidavits. These were Sibusiso Sibandze, Nkosini Mamba, Bongani Dlamini and Simon Maseko. Three applicants did not testify as they could not be located. On behalf of the respondent two witnesses testified being Wayne Lavendale and Luke Mavimbela.

[5] The applicants' evidence revealed that the applicants were employed on various dates by the respondent between 1999 and 2000. They were involved in the baking of bread from start to finish. The process included mixing the dough, putting the dough into the pans, operating the oven, removing the bread from the oven, putting it into plastics and packing it. Some of the applicants were employed as general labourers and some had specific designations like dough mixer, dough panner and machine operator.

[6] The applicants were working an eight-hour shift. At the time of their dismissal all the applicants were on the night shift which started at 8:00 p.m. until 04:00 a.m. on the following day. The machinery would sometimes experience problems resulting in slow down of production. The employees on duty in such a case would be expected to work overtime. The employees were however later stopped from working overtime without prior authorisation as management was of the view that they would occasionally deliberately delay production so that they could work overtime in order to make more money. The evidence by management was that overtime was being abused by the employees and management issued instruction that the employees would work overtime only when it has been sanctioned by management.

[7] The new arrangement on overtime was that the employees would be notified prior to the clocking out time that they would be required to work overtime. On the night in question in this case the night shift supervisor Njiyela Mavana notified the General Manager Mr. Wayne Lavendale that there was going to be a need for the applicants to work overtime as the production was slow and the order was huge. Wayne Lavendale then gave the authority to work overtime through Njiyela Mavana. When clocking out time came however the applicants stopped work and clocked out. They told the court that they never got the message from Njiyela Mavana that overtime had been authorized by Wayne Lavendale.

[8] The applicants were therefore charged with insubordination, poor work performance and willfully causing damage to the company. They pleaded not guilty to all three charges but were found guilty by the chairperson, Mrs. Kay and were dismissed. They had a previous written warning in their records. Only two of the dismissed employees in that shift appealed.

[9] The respondent's case against the applicants was that on 13.03.02 they were given the instruction to work overtime but they ignored it. Wayne Lavendale said he did come to the work place at about 04:00 a.m. and saw the applicants going out of the premises. He said he called them and told them to go back to work but they refused. He said only one employee agreed to go back to work by the name of Siphon Gama. Wayne Lavendale went to the production area and found bread having spilled onto the floor. He picked the bread up with the help of Siphon Gama and other workers that were there of other departments.

[10] Wayne Lavendale said the shift that the applicants were in was very militant. He said this shift had a score to settle with the management for stopping them from working overtime without prior authorization. Wayne Lavendale said the respondent stopped unauthorized overtime because it was being abused. This witness also said the accused on that morning left earlier than the official time. He said the respondent gathered this information from the clock cards.

[11] **Analysis of the evidence:**

The evidence that the applicants knocked off earlier than the official time was clearly lacking. RW1, Mr. Wayne Lavendale told the court that they relied on the information on the clock cards that the applicants clocked out early than the normal time. He submitted annexures "MRB3" and "MRB4" to court. These documents are the copies of some of the applicants' clock cards. The only ones shown to the court belonged to Duma Sacolo and Nkosini Mamba. The documents are not good copies but they show that Nkosini Mamba clocked out at 03:55 a.m. and Duma Sacolo clocked out at 03:57 a.m. In annexure "MRB3" the numbers "55" are handwritten. There was no explanation given in court as to why the original documents could not be tendered.

[12] The applicants were not however charged for clocking out earlier than the normal time. Further, their evidence was that it was the supervisor who was responsible for keeping the time and would tell them if it was time to go. If therefore some of the applicants clocked out some few minutes before time on that morning, it is the supervisor who should be blamed for having released the workers earlier than the normal time.

RW1 said the charge of poor work performance related to the manner that the applicants carried out their duties on that night resulting in the bread being left unattended and spilling onto the floor.

[13] The applicants denied that they refused to work overtime on that night. They said they never got the instruction to work overtime. The respondent had a duty therefore to prove on a balance of probabilities that the message from the General Manager, RW1 was relayed by Njiyela Mavana to the applicants that they should work overtime. Njiyela Mavana did not testify before the court. The court was informed that he has since passed away. What is disturbing however is that even during the disciplinary hearing Njiyela Mavana did not testify. It is therefore not clear to the court on what basis were the applicants found guilty of insubordination by the chairperson of the disciplinary hearing, Mrs. Kay if the person who was supposed to give the instruction

to the applicants to work overtime did not testify before her.

[14] The record of the disciplinary inquiry marked annexure "RW1" shows that no witness was led by the respondent at the disciplinary hearing. Mr. Wayne Lavendale was both the complainant and initiator. Mr. Wayne Lavendale gave evidence on behalf of the respondent. He in fact played three roles during the disciplinary hearing. He was the initiator, complainant and witness. Such a scenario is clearly undesirable and unprocedural and it severely prejudiced the applicants in presentation of their defence.

See: Menzi Ngcamphalala V Swaziland Building Society Case No. 50/2005 (IC)

[15] The record of the disciplinary hearing shows that the applicants raised the same defence that they raised before the court, namely that they never got the message that they should work overtime. There was therefore a necessity that Njiyela Mavana be called to testify that he did pass on the message to the applicants. RW1 said that he did go to the workplace and found the applicants going away. He said he instructed them to go back to work but they refused and that only one of them agreed to resume work. The applicants disputed this evidence. They told the court that when RW1 came to the scene they had already left and that RW1 only found one employee by the name of Siphso Gama because that employee had decided to wait for transport as was afraid to walk home on foot because he used a different route from the others. AW1 said they walked on foot because when they clocked out they did not find the driver in the motor vehicle that was supposed to take them home. AW1 said it was not the first time that they walked home.

[16] The court will accept the applicants' version that they never received the message from Njiyela Mavana that management had issued an instruction that they should work overtime. From the record of the disciplinary hearing annexure "RW1" on page two it is recorded what RW1 told the chairperson were the reasons for the charges. One of the reasons stated by RW1 was that the applicants refused to wait for him.

If indeed the applicants refused to wait for him, it is not clear why does RW1 now tell the court that he found the applicants at the premises and told them to go back to work

and they refused.

[17] The evidence also revealed that when RW1 went to the workplace he found the workers already on the way out of the respondent's premises. He said some were on the road and some were still at the gate. RW1 spoke to the group that was at the gate among whom was Siphon Gama. During cross examination it became clear that RW1 could not identify those workers that he found at the gate and addressed them except for Siphon Gama, so he was not sure whether the applicants were in that group or not. At page 169 of the transcript he answered as follows during cross-examination;

"AC I mean the applicants in this matter did you speak to any of them.

"A I don't recall whether I had spoken to anyone in particular but I remember that I had only been employed with the company for two weeks, so majority of them I didn't know by face or name. Siphon Gama I acknowledged him because I had worked with him."

The applicants having denied that RW1 spoke to them on that morning, the burden of proof shifted to the respondent to prove on a balance of probabilities that the applicants were among the group of employees that RW1 found at the gate and ordered to go back to work. Among this group of workers was Siphon Gama. The respondent however failed to call Siphon Gama to testify before the court or during the disciplinary hearing.

[18] The evidence also revealed that when the applicants were served with the notifications to attend the inquiry, two of the charges therein were different from what they found at the hearing. On the notification form, annexure "AW1" the charges appear as follows;

"1. work performance

2. willfully caused damage to the bakery by leaving your work before production functions were completed

3. Insubordination."

At the hearing the charges appeared on annexure "RW1" as

- "1. poor work performance***
- 2. willfully causing damages to company***
- 3. Insubordination."***

[19] Further, on the letters of dismissal, the charges on which the applicant were found guilty and dismissed were again different. The dismissal letters contained the following;

"The company has found you guilty of gross of (sic) insubordination, poor work performance, and negligence to your work on the 13th March 2002. You have also a similar offence where you had written warning ..."

It seems therefore that the applicants were hauled to a disciplinary hearing for specific charges but were dismissed on different charges. The only charge that nearly became constant was that of poor work performance. The flaw in this charge however was that there was no evidence that the applicants were ever counseled or subjected to a performance improvement plan. The dismissal of the applicants was therefore procedurally unfair.

[20] There was also the issue of the designations or positions of the applicants. RW2 said that the applicants were general labourers in the production department and that they were being paid E800:00 per month. The applicants said that some of them were holding specific positions. The applicants also said that they were being paid E600:00 instead of on the official salary scale stated in the Regulation of Wages (Manufacturing and Processing Industry) Order of 2001. RW2 told the court that he hired some of the applicants. He produced annexure "MRB1" as proof that the applicants were engaged on contract basis and they earned E800:00 per month. That document however related only to one of the applicants, Mthokozisi Dlamini. The document shows that the parties were involving themselves in a three months' employment contract from 1st October to 31st December 2000. The contract shows that Mthokozisi Dlamini was being engaged as a general bakery worker at a salary of E800:00 per month. There was no evidence by the respondent of what happened after

31st December 2000 as this applicant was eventually dismissed on 15 March 2002.

[21] The court will therefore accept the evidence of this applicant that when he was dismissed in 2002 he was occupying the position of dough panner and that he was being paid E600:00 per month. RW1 did not deny that the applicants were being paid E600:00 per month. His evidence was that this amount was agreed upon by the parties because the company was not performing well. It was only RW2 who tried to insist that the applicants were being paid E800:00 per month at the time of their dismissal. RW2's evidence was contrary to that of RW1 and to the instructions given to the respondent's first attorney. It is not hard to understand why RW2 conducted himself in that manner. He was inside the court at some point during the trial, so he was trying to patch up the damage that had already been done to the respondent's image that it was exploiting the applicants. RW2 is a former member of parliament and is the only Swazi director of the respondent.

[22] RW2 said he could not recall how many of the applicants were on contract. The court will therefore accept the evidence of applicants that they were employed on a permanent basis. The only other document relating to the employment of the applicants handed in by RW2 was annexure "MRB2". This document shows the written particulars of employment of Absalom S. Mavuso. It shows that he was employed on 1st June 2000 as a general bakery shows that he was employed on 1st June 2000 as a general bakery worker on a three months' probation. There was no evidence as to what happened after the three months' period. The court is entitled to assume that after the probation period this applicant was confirmed to permanent staff. This witness told the court that when he was dismissed in 2002 he was occupying the position of baker. In the absence of evidence of what became of him after the probation period, the court will accept his evidence that at the date of his dismissal this applicant was occupying the position of baker.

[23] The respondent could simply have retrieved the relevant documents from the files of the applicants since it was clear from the beginning that some of the applicants were denying that they were general labourers. The applicants who denied that they were general labourers shifted the burden of proof to the respondent. As already pointed out the respondent could simply have furnished the court with the employment records of

the applicants. The respondent has therefore failed to prove on a balance of probabilities that all the applicants were employed as labourers at the time of their dismissal. Only two of the applicants told the court that they were employed as general labourers. These were Bongani Dlamini and Simon Maseko.

[24] The respondent's defence was simply that it hired the applicants as general labourers. The court has a duty to promote fairness and equity in labour relations. The court has a duty in this case to winnow out the chaff of the nomenclature and regard the allowed to give an employee an appellation that is convenient to him so as to avoid payment of that employee in terms of the correct salary scale.

The respondent in this case wants to hide behind the designation of the applicants as general labourers. The respondent does not deny that the applicants were in fact doing the tasks that they told the court that they were doing. AW1, Mbuso Dlamini for example told the court that he was a dough mixer. The court does not see any reason why he should not be paid on the scale of dough mixer if that is what in fact was doing, regardless of the fact that the respondent chose to give him the appellation of general labourer.

[25] The court will therefore accept the applicant's evidence that they were being paid E600:00 per month. The court is alive to what appears on the employment contract of AW3 annexure "MRB1" that it shows that the salary shall be E800:00 per month. The sum of E800:00 was however a handwritten correction by someone who signed on the top thereof. There is no corresponding signature of AW3 to show that he also acknowledged that handwritten correction. It may well be that indeed when this applicant was first hired he was being paid E800:00 per month. During cross examination of AW3 (p.92 of the transcript) it was put to him that there was an agreement to pay him E600:00 because of the bad performance of the company. Even if it may have happened therefore that some of the applicants were paid E800:00 at some point, it was clear to the court however that at the time of their dismissal the applicants were being paid E600:00 per month.

[26] Two of the applicants entered their positions as packers in annexure "A" of their application. In terms of the Regulation of Wages Order, 2001 however packer is

defined as "an employee who packs garments which are finished into cartons." There is no definition of "bread packer". These applicants will therefore fall under the category of general labourers. Indeed that was the basis of the calculations of their underpayment as it appear in annexure "B" of their application.

[27] The applicants are also claiming a refund of their statutory contributions to the Swaziland National Provident Fund ("SNPF"). The applicants said they made a personal enquiry at the SNPF offices and found that the respondent was not making payments. The amounts remitted to SNPF accumulate a certain interest. The applicants have a right to this interest. The court was advised in a matter that it dealt with recently that it is beneficial to applicants to use the structures of SNPF to claim such monies as the applicants will get their dues plus interest. Further, the respondent will also be subjected to a penalty by the SNPF for failure to make the remittances on time or at all. The court will therefore not make an order on this claim but will advise the applicants to pursue this claim directly through the SNPF offices where they stand to get more than they have claimed in this application.

[28] Only three of the applicants told the court of their personal circumstances. Personal circumstances of individuals are unlikely to be similar. The court therefore is in a difficult position to assess their different situations so as to enable it to arrive at a fair amount of compensation for their unfair dismissal by the respondent. RW2 however told the court that the applicants did not have any skill when they were employed. He said they learnt on the job. It can be safely assumed therefore that the only skill that the applicants have is that of baking bread. Wherever they are presently, they are probably in bakery related employment which, as we have seen, is a low salary industry.

[29] Taking into account all the foregoing the court will enter judgement in favour of ten of the applicants, being applicants 1, 2, 3, 5, 7, 8, 9, 10, 11 and 13 as they appear in annexure "A" of the application. The application by applicants 4, 6 and 7 is dismissed with no order as to costs.

[30] The court will accordingly make an order that the respondent pays the applicants the following amounts as terminal benefits and compensation for the unfair dismissal:-

1. Absalom Mavuso:-

a) Notice Pay	E738.92
b) Underpayment	E2,242.56
c) Severance	E284.20
d) Leave	E255.78
e) Compensation (E738.92 x 6)	<u>E4,433.52</u>
TOTAL	E7,954.98

2. Mthokozisi Dlamini:-

a) Notice Pay	E738.92
b) Underpayment	E2,242.56
c) Leave	E198.94
d) Compensation (E738.92 x 6)	<u>E4,433.52</u>
TOTAL	<u>E7,613.94</u>

3. Nkosinathi Maziya:-

a) Notice Pay	E862.04
b) Leave	E232.08
c) Underpayment	E3,960.17
d) Compensation (E862.04 x 6)	<u>E5,172.24</u>
TOTAL	E10,226.53

4. Sibusiso Sibandze:-

a) Notice Pay	E862.04
b) Underpayment	E2,102.16
c) Additional Notice	E99.99
d) Severance	E250.08
e) Compensation (E649.92 x 6)	<u>E3,899.52</u>
TOTAL	<u>E7,001.59</u>

5. Mbuso Dlamini:-

a) Notice Pay	E862.04
b) Underpayment	E3,960.17
c) Leave	E596.00
d) Compensation (E862.04 x 6)	<u>E5,172.24</u>
TOTAL	<u>E10,590.45</u>

6. Simon Maseko:-

a) Notice Pay	E738.92
b) Underpayment	E2,382.96
c) Additional Notice	E113.68
d) Severance	E284.20

e) Leave	E341.04
f) Compensation (E738.92 x 6)	<u>E4,433.52</u>
TOTAL	<u>E8,294.32</u>

7. Makhosonke Maseko:-

a) Notice Pay	E738.92
b) Underpayment	E2,102.16
c) Additional Notice	E113.68
d) Severance	E284.20
d) Leave	E341.04
e) Compensation (E738.92 x 6)	<u>E4,433.52</u>
TOTAL	<u>E8,013.52</u>

8. Mkhumbuleni Vilakati:-

a) Notice Pay	E889.40
b) Underpayment	E4,539.66
c) Additional Notice	E 136.83
d) Severance	E342.07
e) Leave	E307.86
f) Compensation (E889.40 x 6)	<u>E5,336.40</u>
TOTAL	<u>E1 1,552.22</u>

9. Bongani Dlamini:-

a) Notice Pay	E738.92
b) Underpayment	E2,382.96
c) Additional Notice	E113.68
d) Severance	E284.20
e) Leave	E341.04
f) Compensation (E738.92 x 6)	<u>E4,433.52</u>
TOTAL	<u>E8,294.32</u>

10. Nkosini Mamba:-

a) Notice Pay	E649.92
b) Underpayment	E2,102.16
c) Leave	E174.98
e) Compensation (E649.92 x 6)	<u>E3,899.52</u>
TOTAL	<u>E6,826.58</u>

The total amount of the claims is **E86,368.45**. The respondent is also ordered to pay the costs of suit.

The members agree

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT