IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 313/2004**

In the matter between:

RUSSEL T. YOUNG **Applicant**

and

SWAZI LOTTERY TRUST **Respondent**

CORAM:

N. NKONYANE	**:**	**JUDGE**
D. MANGO	**:**	**MEMBER**
G. NDZINISA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. SIBANDZE**
FOR RESPONDENT	**:**	**Z. JELE**

J U D G E M E N T – 02/12/08

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1. This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of section 85 of the Industrial Relations Act No. 1 of 2000 (as amended).

2. In his papers the Applicant stated that he was employed by the Respondent as Chie Executive Officer on 6th March 2001 in terms of

a written contract he was earning a monthly salary of E18,500.00 per month. He work continuously for the Respondent until he we dismissed on 15th December 2003 after he was found guilty by the chairman of a disciplinary hearing ion charges of insubordination and insolence.

3. The applicant stated in his papers that his dismissal was unfair and not in compliance with Section 36 of the Employment Act 1980 and that it was unreasonable. The Applicant said his dismissal was unfair because the instruction to relocate to Swaziland that he failed to comply with was in breach of his terms and condition of employment and was therefore not a lawful instruction. The Applicant further averred tat the real cause of his dismissal was that he chose to enforce his rights in terms of the contract of employment by challenging the instruction to relocate to Swaziland. He therefore averred that his dismissal was automatically unfair as contemplated by Section 2 of the Industrial Relations Act.

4. The Respondent in its Reply avered that the Applicant's dismissal was lawful and fair and in terms of section 36 of the Employment act because he was found guilty by a properly constituted disciplinary hearing before an independent chairperson and was given the opportunity to defend himself against the charges laid against him.

5. The evidence led before the court revealed that the Respondent is a gamin company and is a subsidiary. The parent company is based in the Republic of South Africa. The Applicant was employed by the company in South Africa as the chief Executive Officer ("CEO") of the Respondent. The Applicant and the holing company entered into

a written contract of employment in Midrand South Africa on 6th March 2001. The Applicant was however based in South Africa and had an office there. He would travel to Swaziland from time to time whenever it was necessary.

6. A new Managing Direct of the holding company b the name of Warren Banks was employed. Within three months of his taking over he instructed the Applicant to relocate to Swaziland. The Applicant refused to do so because he believed that this was contrary to the agreement made with the previous management that he was going to be based in South Africa. In a bid to enforce his rights against the Respondent the Applicant reported the matt to the Labour Commissioner invoking the provisions of Section 26 of the Employment Act.

7. Section 26 of the Employment Act deals with change in terms of conditions of employment of an employee. That section provides that where the employee is of the opinion hat changes in his terms of employment would result in less favourable terms and conditions of employment that those that the employee previously enjoyed the employee may request the intervention of the Labour Commissioner the employer is required to submit certain information to the office of the Labour Commissioner. The holding company in this case did not do so, apparently because it thought it was not well bound by the Labour laws of Swaziland.

8. Numerous correspondence exchanged between the parties. In one of the letters writes by the Applicant to Mr. Warren Banks appearing on papers 25 -29 of bundle “A”. The Applicant we accused of having used very strong language against his superior, hence the

charge of insolence. The Applicant was suspended with full pay pending investigation. He was thereafter served with a notice to attend a disciplinary hearing by letter dated 30th October 2003 which appear on page 39 of Bundle "A". The charges were that of insolence, insubordination alternatively breach of contract by refusing to relocate to Swaziland and breach of clause 10.3, 10.4 and 10.6 of the contract of employment. The Applicant was found guilty except on clause 10.4. He was accordingly dismissed. He reported a dispute, the matter could not be resolved by conciliation, hence eh present application.

ANALYSIS OF THE EVIDENCE

9. It is not clear to the court why did the chairman of the disciplinary hearing find the Applicant guilty on the charges of insubordination and breach o contract. During the hearing the person who drafted the contract and who was in management at the time, Mr. Michael Werner was able to give evidence through the telephone and he confirmed the Applicant's evidence that it we agreed by the parties that the Applicant would be based in South Africa though he we going to be in charge of the Swaziland operations. (See pages 258-25 of the transcription of the disciplinary hearing).

10. Mr. Ernest Hlophe himself in his judgement Bundle "c" states in page seven thereof that:

"Mr. Michael Werner a former director did state when evidence was led over the telephone the board greed verbally to Mr. Young being based in Johannesburg then and also confirmed the letter dated the 7*th May 2002*

from the board calling upon Mr. Young to fulfill his obligations as Chief Executive of the Swaziland operation s which required his flu, time attention was signed by him."

11. That was the evidence of the Applicant even before this court that there was an agreement that he be based in South Africa. Further clause 4 of the contract of employment states that;

"….. The employer will pay for fuel consumed on return trips to Swaziland from the offices in Swaziland from the E500.00 (Five Hundred Emalangeni) monthly in lie of any medical aid fund to which the Employee might subscribe ……."

The words "return trips to Swaziland" clearly mean that the Applicant would be traveling from south Africa to Swaziland and returning to South Africa.

12. On the wording of the contract of employment and the evidence of the Applicant that it was agreed that he be based in South Africa it is clear to the court that the Applicant was wrongfully and unlawfully dismissed on the charges of insubordination and breach of contract by failure to relocate to Swaziland.

13. The charge of insolence was largely based on the contents of the letter that Applicant wrote to Mr. Warren Banks on 29 September 2003 appearing on pages 25-29 of bundle "A". This letter was in response of a letter written on the 12 September 2003. The letter that was written to the Applicant on 23 September 2003 was responding to the Applicant's request to the holding company AG1 Africa (Pty) Ltd, to submit certain information to the Labour

Commissioner in Swaziland in terms of Section 26 of the Employment Act. In its response AG1 Africa (Pty) Ltd adopted a legalistic approach. The company denied that it had any employment relationship with the Applicant. It also denied that it employed any person within the Kingdom of Swaziland. The letter written to the Applcinat dated 12th September 2003 was the one in which Mr. Warren Banks as telling the Applicant that his contract of employment did not state where the Applicant would be based but only that he was required to be in Swaziland on a regular basis.

14. In this letter of 12th September 2003 Mr. Warren Banks further stated that he made a visit to Swaziland and the staff there asked him why was the Applicant not working there. In the last paragraph Mr. Banks stated that:

"…….. I therefore want you to permanent relocate to Swaziland by 1 November 2003……"

15. Further to these letters a formal meting was held between Mr. Banks and the Applicant on 4th August 2003. In That meeting Mr. Banks secretary Gerda Groenewald was present taking notes. The minutes of the meeting appear on pages 14-17 of bundle "A". In the minutes it reflects that Mr. Banks said to the Applicant that he "portrays poor management skills." Again Mr. Banks is reworded as having said that the Applicant portrays lack of management skills." It was clearly not proper for Mr. Banks to use thee words agsinst the Applicant a CEO on the presence of a junior officer.

16. The evidence revealed that the Applicant did not take kindly to the

way he was being treated by Mr. Banks. From the evidence of the letters that were written the Applicant and the way that the meeting was conducted and the way that the meeting was conducted by Mr. Banks. It is not hard to see why did the Applicant started to use strong language in his letters to Mr. Banks. Mr. Banks thereafter accused the Applicant of being insolent.

17. We do not however agree that the Applicant was insolent. We admit that the letter appears to be strong. The strong language used by the applcinat should not be considered in isolation. The tone of the language was set by Mr. Banks when he referred to the Applicant as a weak manager who portrayed poor management skills in the presence of a junior employee. The Applicant was a CEO, a senior employee of the Respondent. At no point did the Applicant get so angry at the way that he was being treated by Mr. Banks so as to use an insult. The complaint by Mr. Banks was that the Applicant underlined some parts of the sentences and also had some sentences in bold characters. Mr. Banks also complicated of the use of words “you do the math”, your comments are unfounded”, your conduct in this regard is highly questionable and contents of this paragraph is denied.”

18. Mr. Banks said he found the Applicant’s liters to him to be disrespectful and legalistic. It was submitted on behalf of the Respondent that all of these demonstrated elements of insolence. As already pointed out we do not agree that the applcinat was insolent.

18.1 The tone of the language used was set by Mr. Banks. Not once did the Applicant use foul or insultive language. to say

that ‘ the contents of this paragraph is denied” does not mean that the Applicant was saying that Mr. Banks was telling lies as submitted by Mr. Jele. This is ordinary legal language or style of answering.

18.2 To say that the Applicant was insolent just because he adopted a legalistic language is an absurdity too gross to be insisted on.

18.3 It was Mr. Banks who started the legalistic approach when he sat that AG1 (Pty) Ltd never employed the Applicant. When the Applcinat decided to reply to Mr. Banks’ letters paragraph by paragraph, a practice that is in daily use in court Mr. Banks says the Applicant is insolent. We find this submission devoid of substance.

19. In most of the cases reported the insolence consisted of use of foul language or certain physical employee. For example in the case of **en ‘n ander v Leeupoort Mineraloe Bron (Edms) BPK (1987) 8 ILJ 366 (C)** the employee three with bunch of keys on the counter after the employee had been called by the Managing Director to discuss complaints by clients. The employee told the Managing Director to do the work himself. In the case of **Evan V.CHT Manufacturing (Pty) Ltd 13 ILJ 1585 (C)** the employee called the Managing Director an “ignorant bastard”. Further in cases where insolence is established, dismissal is no justified unless he insolence is of a sufficiently gross nature .

See **CCAWUSA v Wooltru Limited t/a Woollworths (Randburg) (1989) 10 ILJ 311 (IC).**

20. The court therefore will come to the conclusion it has not been proved on a preponderance of probabilities that the language or style used by the Applicant in his letter to Mr. Banks or that his demeanour and action toward Mr. Banks showed gross disrespect toward Mr. Banks.

21. The other charges that the Applicant faced were that he breached clauses 10.3, 10.4 and 10.6 of the contract of employment. The Applicant was found not guilty on 10.4. Clause 10.3 provides that the Applicant shall strictly conform to and comply with the directions and instructions given to him by the employer and the directors/superiors of the Ultimate Holding Company Admiral Leisure World Limited.

Clause 10.6 provides that:

"*Generally show towards the Employer/ the directors of Admiral Leisure World Limited the utmost good faith."*

22. The charge sheet did not elaborate as to what exactly did the Applicant do that amounted to a breach of these clauses. This concern was also raised by the Applicant at the disciplinary hearing. From the evidence presented in court one the instructions given to the Applicant that he should attend a mediation at the Holding company's premises in Midrand on Wednesday 10th October 2003 at 13.00 hours. This instruction was by letter written on behalf of the Respondent to the Applicant on 30th September 2003. During this period the Applicant was in

Swaziland. A copy of this letter was made to Marwick Khumalo, a local director of the Respondent. The Applicant was asked to confirm his attendance in writing by no later than 12.00 house on that same day 30th September 2003.

23. Paragraph 23 of he letter appears as follows:

"I have arranged with Mr. Malmooot Fadal, an attorney, to conduct a mediation meeting between the company and yourself, on Wednesday 1 October 2003 at 13h00 at our premises in Midrand. I will therefore expect you to return to Johannesburg as soon as it is possible, in nay case no later than today, Tuesday 30 September 2003*, in order for you to prepare yourself for the mediation."*

The Applicant was the CEO of the Respondent. To be given such a short notice to confirm his attendance in writing by no later than 12.00 noon on the same day that the letter was written, and also to expect him to attend the mediation in Midrand from Swaziland was clearly unreasonable. There is no doubt to the court that Mr. Bank's conduct was meant to trap the Applicant by putting those stringent conditions. He was calling the Applicant to mediation but his language was not reconciliatory.

24. Mr. Banks wrote another letter on the same day saying that:

"In my above letter I have requested you to confirm your attendance at a mediation meeting scheduled for Wednesday the 1*st October at 13h00 at our premises in Midrand, in writing by no later than 12hoo today. It is now 13h00 and I have not had the courtesy of a reply or a request for*

an extension to reply.

This leaves me no option but to instruct you to report to our Midrand Head office at 13h00 Wednesday the 1st of October. Please ensure that you are fully prepared to attend the mediation meeting that will commence a 13h00 with Mr. Manrnoot Fadal.

Failure to adhere to this instruction will result in the necessary disciplinary action being instituted against you….."

25. From the tone of the letter and the unreasonable time frames, there is no doubt to the court that Mr. Banks was just trying by all means to widen the net to have an excuse to dismiss the Applicant. Indeed the chairman of the disciplinary hearing found the Applicant guilty of failing to confirm his attendance and also of failing to attend the Mediation. As already pointed out these instructions were totally unreasonable and the Applicant would not have been found guilty for failure to adhere to unreasonable time frames.

26. The evidence also revealed that the Applicant in one meeting is said to have told Mr. Banks that he had damaging information about the company. Mr. Banks wrote to the Applicant on 12 September 2003 and asked the Applicant to supply this information to him by 30th September 2003. Mr. Banks said the Applicant failed to reveal this information within the stated period, but only revealed it during the disciplinary hearing. It does not appear from the transcript of the minutes what that damaging information was. The transcript reveals that at some point during

the meeting, the recorder Gerda Groenewald went out and was unable to record all that was said I that meeting.

27. It is not hard to understand why the Applicant did what he did. He was cornered by Mr. Banks. The circumstances that were the prevailing were not conducive to Mr. Banks himself had also taken the matter to another level. He had started to investigate whether the Applicant was making returns. The Applicant therefore resorted to this tactic as a means to try and stop Mr. Banks from doing something that the Applicant knew it was wrong as it was in violation of his terms and conditions of employment. In the circumstances of this case it was therefore unfair for the Applicant to be dismissed.

28. On the totality of the evidence before court it became clear that the so called “secret” information was meant by the Applcinat to be an ammunition aimed at preventing Mr. Banks from continuing with what he was doing which the Applcinat believed was wrong. There is no indication that the chairman of the disciplinary hearing did take into account the conditions that were the prevailing before he found the Applicant guilty of not heeding the instruction to divulge the secret information. Further, looking at the evidence objectively and taking into account all the circumstances of the case, it cannot be said that the Applicant’s conduct in this regard showed lack of utmost good faith.

29. The evidence also revealed that the Applicant on seeing that Mr. Banks intended to isolate ten terms of his contract of employment, he reported he matter to the Labour Commissioner. From that time until the dismissal of the Applcinat went on the offensive,

looking for every reason to dismiss the Applicant. The Applicant was within his rights to sac legal intervention in the matter. The conduct of Mr. Banks of forcing the Applicant to relocate clearly amounted to a situation of automatically unfair dismissal. In terms of Section 2 of the Industrial Relations Act, automatically unfair dismissal means a dismissal where the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual inters between the employer and the employee.

30. Taking into account all the aforegoing observations and all the circumstances of the case, the court comes to the conclusion that the dismissal of the Applicant was automatically unfair.

31. RELIEF

The Applicant was a senior employee of the Respondent. He was employed in an industry wherein if you are dismissed it becomes difficult for one to get employment in the same industry. His life was dramatically changed by the dismissal. From a CEO he became a jobless citizen. This was clearly a traumatic experience for which the court must order that he be compensated. He is presently not employed. Taking all these factors the court will order that the Respondent pays the Applicant an equivalent of 15 months salary as compensation for the unfair dismissal.

32. The court will therefore make the following order that the Respondent pays the Applicant the following amounts as terminal benefits and compensation for the Applicant's unfair dismissal.

1.	**Notice pay**	**E18,500.00**
2.	**Additional Notice**	**E 3,700.00**
3.	**Severance**	**E 9,250.00**
4.	**Compensation**	**E277,500.00**
	TOTAL	**E308,950.00**

33. The Respondent is to pay the costs of suit.

The members agree.

N. NKONYANE

JUDGE OF THE INDUSTRIAL COURT