IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 114/2006

In the matter between:

SANDRINO DU PONT **APPLICANT**

and

MAXI PREST TYRES (PTY) LIMITED **RESPONDENT**

CORAM:

S. NSIBANDE: **PRESIDENT**

JOSIAH YENDE: **MEMBER**

NICHOLAS MANANA: **MEMBER**

MR. C. MOTSA: **FOR APPLICANT**

MR. S. MNISI: **FOR RESPONDENT**

J U D G E M E N T - 15/04/2010

1. The Applicant applied to the Industrial Court claiming maximum compensation for unfair dismissal, notice pay, additional notice pay, severance allowance and certain underpayments.

2. The Applicant was employed by the Respondent in September 1999 as Sales Representative. According to his last pay slip entered into evidence and marked Exhibit 6, the Applicant's date of engagement was 21st September 1999. At the time of his dismissal Applicant was earning E6 360 per month plus certain commissions.

3. The Applicant's services were terminated on the 23rd July 2004 after he had been found guilty at a disciplinary hearing on charges of gross misconduct, working against the interests of the company and destroying completely the relationship in so far as trust is concerned. Applicant complains that the termination of his services was both

substantively and procedurally unfair.

4. It is common cause that at the date of the termination of his services, the Applicant was an employee to who Section 35 of the Employment Act 1980 applied.

5. The Respondent contends that the termination was fair both substantively and procedurally and that it was reasonable in the circumstances of the matter to dismiss the Applicant, because Applicant had registered a company whose business was to have been in direct competition with that of Respondent.

6. The Applicant's testimony was that his problems with the Respondent started in April 2004 while he was working as a Sales Manager. He testified that a certain Mervin Brown who had earlier left the Respondent's employ returned to work for the Respondent. When Mervin Brown returned to Respondent, he found that the Applicant, who had previously been his subordinate, was now the Sales Manager and now his supervisor. Mervin Brown was married to Sofia Brown, the Respondent's Administration Manager. The Browns were apparently unhappy with the turn of events and according to Applicant, the Administration Manager started to ill treat him.

By way of example, Applicant stated that Mrs. Brown caused his petrol card to be removed from him for no reason.

The Applicant alleges that he reported the problems to his Managing Director Fred Bridgens who failed to take any action.

7. In the same month of April 2004, Mr. Fred Bridgens demoted the Applicant after expressing his disappointment with the Applicant's work performance. Applicant was demoted from being Sales Manager to become a Sales Representative. He, however, retained his customer accounts, thus continued to earn commission.

8. The Respondent's evidence in rebuttal of Applicant's evidence in this regard was led by one Sofia Brown, who denied that there were any problems between the Applicant and her. She stated that if she was strict on Applicant it was because she expected him to stick to his budget and also achieve his targets as set by head office. Sofia Brown explained that the petrol card Applicant complained she had taken away was taken away as a control measure and that all card holders were asked to turn in their cards to the Administration Manager.

9. In the view of the Court nothing turns on the relationship between the Applicant and Sofia Brown. Whether that relationship was good or bad, it seems to us it had nothing to do with the termination of the Applicant's services by the Respondent. This is more so because the Applicant testified that in the month of June, his Managing Director Mr. Bridgens commended him on his work commenting that Applicant seemed more focused on his work. It seems to us that whatever was happening between Applicant and the Administration Manager did not affect how the Managing Director viewed the Applicant. It is not necessary in our view to make a finding on the nature of their relationship in the circumstances.

10. The Applicant's evidence regarding the termination of his employment is that at the end of June or beginning of July Mr. Bridgens called him to his office where he was questioned about a company he had allegedly registered. It was Applicant's evidence that he admitted to having had a company called Auto City registered. Thereafter Mr. Bridgens advised him that he had broken Maxi Prest rules by registering the company. Applicant was then given time to think about whether he wanted to work for Respondent or to leave and continue with the new company he had registered.

It was Applicant's evidence that he chose to stay and work for the Respondent and advised Mr. Bridgens that he had told his partner Mr. Carlos Gil that he was pulling out of the venture.

11. Applicant testified that one Friday afternoon while he was with a client Mr. Bridgens called him back to the Respondent's premises and ordered him to resign from his employ. Applicant refused and was then reminded that he had registered a company and told that Mr. Bridgens had to *"cover his own arse".* When Applicant reminded Mr. Bridgens that he had previously been given a choice to either resign to work with his registered company or stay and continue working for the Respondent and that Applicant had chosen to stay. Mr. Bridgens then suspended Applicant there and then and told him there would be a hearing in due course. On 12th July 2004 Applicant received a letter of suspension from Fred Bridgens. The letter which was handed in as an exhibit also set out charges that Applicant would face at the hearing scheduled for 15th July 2004. Applicant was to face three charges - (I) gross misconduct; (ii) working against the interests of the company; and (iii) destroying completely the relationship in so far as trust is concerned.

There was no explanation of where and in respect of what, the charges arose. For example, no description of the gross misconduct was given. The letter advised Applicant

he was entitled to a representative at the hearing.

12. Regarding the disciplinary hearing, the Applicant complained that he was not told of his rights to representation, to call witnesses and to cross examine witnesses brought by the company. He was given 15 minutes to find a representative. The hearing was chaired by Mr. Kevin Haycocks and Mr. Bridgens was the initiator. It was Applicant's evidence that the initiator also gave evidence and that no witnesses were called. Applicant alleges that every time he asked questions of Mr. Bridgens, the Chairman Mr. Haycocks would answer on his behalf. The hearing was finalized on the 19th July 2004 when the Chairman advised Applicant of his finding of guilt on all charges.

13. Applicant denied all the charges and told the Court that he learnt for the first time at the hearing that the charges related to his action of registering a company. Applicant testified that the allegation against him in charges 1 and 3 related to his registering a company that was alleged to be in direct competition with the Respondent. He denied that the company he had registered Auto City, was to be in competition with Respondent pointing out that the objectives of Auto City were to provide an auto style shop i.e. to sell spoilers, sound systems and mag rims. Applicant's uncontroverted evidence was the Respondent dealt strictly in tyres and had no auto style shop. He denied that Auto City intended to import cheap tyres.

14. Applicant also testified that he learnt at the hearing that he was being accused of having procured certain premises for Auto City whereas the said premises had been earmarked by the Respondent which wanted to extend its operations. He denied procuring premises for Auto City and stated that Auto City had not started trading even up to the stage he had pulled out of the venture at Mr. Bridgens' instance.

15. The Applicant's other complaint with regard to the disciplinary hearing was that the Chairman Mr. Haycocks, was junior to Mr. Bridgens. He said Mr. Bridgens was the Managing Director while Mr. Haycocks was the Factory Manager. Applicant's contention was that Mr. Haycocks' ability to act independently of his superior's influence was therefore compromised.

16. In terms of Section 42 of the Employment Act 1980, the Respondent has the burden to prove that the services of the Applicant were terminated fairly. The Respondent must prove, on a balance of probability, that the reason for the termination was one permitted by Section 36 of the Act and that taking into account all the circumstances of the case, it was reasonable to terminate the applicant's services.

17. In attempting to discharge the burden, the Respondent called two witnesses, Mrs. Sofia Brown and Mr. Kevin Allen Haycocks. Mrs. Brown's evidence was primarily led to rebut Applicant's evidence of a sour working relationship. As already indicated above, our view is that the nature of the relationship Applicant had with Mrs. Brown had no hand in his dismissal. She intimated that she had heard of the reasons for Applicant's dismissal but had played no part in his disciplinary enquiry.

18. Mr. Kevin Haycock's evidence was primarily concerned with the disciplinary enquiry. He sought to assure the Court that the hearing was procedurally fair in that Applicant's right to representation and to cross examine witnesses were explained to him and that Applicant understood the charges he faced as well as the seriousness of the charges.

19. Mr. Haycocks's evidence was that no witnesses were called by the Respondent and that he relied entirely on the evidence of Mr. Fred Bridgens. He sated that according to Mr. Bridgens, the Applicant has opened a business in direct conflict with Maxi Prest. Mr. Haycocks then stated that *"no evidence was led by the defendant to disprove Fred's testimony."*

20. Mr. Haycocks also testified that the Applicant had come to the hearing without a representative and was allowed time to find one. The Applicant had then found Mr. Ntombela to represent him. In a curious piece of evidence given by Haycocks he stated that *"Mr. Ntombela was asked questions in proof of Fred's case."* In other words, the representative suddenly became the initiator's witness. More curious are the Minutes as handed into Court by Mr. Haycocks as part of his evidence. These Minutes start by saying that the initiator began by asking the accused whether he had procured premises. They continue to set out a number of questions asked of the accused by the initiator. The initiator further asked questions of the accused's representative. The initiator also stated that the accused had been seen on numerous occasions at the new tyre shop by members of the Maxi Prest staff. No members of the Maxi Prest staff gave evidence at the hearing.

21. Mr. Haycocks also denied being Fred Bridgens' subordinate and stated that he did not report to Bridgens but to a certain Krammer Garry in Johannesburg. He claimed that the company ran two separate divisions and that he was head of the manufacturing division while Bridgens was head of retail division.

22. The Respondent called no further witnesses explaining to the Court that Fred Bridgens was now employed in Botswana and that despite their best attempts they were unable to have him come to testify on the Respondent's behalf.

23. It is trite that this Court does not sit to review the decision of a disciplinary hearing but that the matter starts *denovo* with this Court reaching its own decision as to the fairness or otherwise of an Applicant's dismissal.

Swaziland United Bakeries v Armstrong Dlamini (Industrial Court of Appeal Case No. 117/94).

24. No evidence has been led by the Respondent before the court to establish the charges that Applicant faced at the disciplinary hearing and to establish that Applicant was terminated for a fair reason envisaged by Section 36 of the Employment Act. The evidence of Applicant regarding the status of Auto City, the company he had registered, is uncontroverted i.e. that the company only existed on paper and was not trading at the time of the disciplinary hearing. The evidence that Fred Bridgens on discovering the registration of the company, gave him the option to pursue his dreams and go and work for his company or sever all ties with the new company and continue to work for Respondent also stands uncontroverted. No evidence was led by Respondent to establish that the company Applicant sought to start would have been in direct competition with the Respondent. Applicant's evidence that Auto City would have been involved in a trade different from that of Respondent is also uncontroverted.

25. The Respondent also did not establish that there was a rule, known to Applicant, forbidding the registration of a company by Respondent's employees. The act of forming a company which does not trade in competition with the employer cannot be construed as misconduct in the absence of such a rule. Further, it appears to us that Fred Bridgens had already ruled on the company formation matter when he gave the Applicant a chance to sever his relationship with Auto City and continue working for the Respondent. That being so, even if Respondent had a rule prohibiting the registration of companies by its employees, the right to take action against the Applicant had been waived by the Respondent through Fred Bridgens' actions.

26. Consequently we find that the burden of proving the fairness of the Applicant's dismissal has not been discharged. The Respondent has failed to establish any basis for the dismissal of Applicant.

27. On the question of procedural fairness the Applicant had three complaints. Firstly that the charges were never explained to him nor were his rights. As a result Applicant could only get a representative on the day of the hearing, thus hindering his preparations for the hearing.

The Applicant in our view is a bright young man who had attained the position of Sales Manager before his demotion. The letter advising him of the hearing advises him of his right to representation by an employee of the Respondent. It is not conceivable in our view that he did not see that the letter advised him so.

The failure of the Respondent to particularize the charges was in our view unfair particularly when one considers the time given to Applicant to prepare for the hearing.

Fair procedure includes the right to prepare for a disciplinary hearing and to prepare for a hearing means one should know exactly what charges one faces. To simply say an employee has committed a misconduct without any explanation of what the misconduct entailed will surely hinder the employee's preparations for a hearing.

28. The Applicant's second complaint regarding evidence in respect of the first and second charges has already been addressed in para 19 above. That no witnesses were called is common cause.

29. The Applicant's third complaint that the Chairman Mr. Haycocks consulted with the Federation of Swaziland Employers before issuing his verdict. Mr. Haycocks confirmed his consultation with the FSE but stated that it was in respect of procedure and sanction. Mr. Haycocks' evidence was that he wanted to ensure that the decision was fair thus he adjourned the hearing and consulted FSE to get advice on fair procedure and sanction. The Applicant's suggestion is that the Chairman exhibited some bias in the matter and did not make up his own mind regarding the sanction but deferred to the FSE.

While it is true that the Chairman of a disciplinary hearing must make up is own mind on the matter without deferring to the opinion or desired outcome of other people, one must consider that the Federation of Swaziland Employers had absolutely no interest in the outcome of the hearing. The Chairman did not consult with management in Applicant's absence as was the case in **Graham Rudoph v Mananga College IC Case No. 94/07.** The Chairman was transparent regarding his intention to consult the Federation of Swaziland Employers. Applying the common law test for disqualifying bias we are of the view that the Chairman's conduct of consulting with the Federation of Swaziland Employers would not cause a layman in the position of the Applicant to reasonably suspect bias or lack of independence on the part of Haycocks which precludes the likelihood of a fair hearing.

30. We have, however pointed out above some of the procedural anomalies in the

Respondent's disciplinary hearing. It appears from the minutes and from the evidence that the Respondent called no witnesses. A conclusion was reached that Applicant was seen working at Auto City during his suspension by numerous employees of the Respondent yet none of those employees were called to the hearing despite that Applicant denied the allegations.

While one should be careful not to equate a disciplinary hearing to proceedings before a court of law or an administrative tribunal, the importance of a fair procedure having a value in itself ought not to be forgotten.

For a fair process to ensue, the Applicant ought to have been allowed to test the veracity of the evidence against him. As it is, it appears that the Chairman preferred the unsubstantiated allegations of Fred Bridgens to the Applicant's denials without any independent evidence being led to establish Fred Bridgens' case.

In the circumstances we find that it was irregular for the Chairman to rely on such evidence without giving the Applicant an opportunity to test same by cross examination. It also seems that the hearing was really a new forum to allow Fred Bridgens to interrogate Applicant on Auto City.

It appears that instead of leading any evidence the initiator, Mr. Bridgens simply started asking the Applicant questions on his involvement with Auto City.

From the Chairman's comment quoted in para 19 above it seems Applicant was then expected to disprove what was said by Fred Bridgens, much against convention where he who alleges has to prove.

31. In the premises the Applicant's dismissal was both procedurally and substantively unfair.

The Applicant is entitled to payment of notice pay, additional notice pay and severance allowance. Although he claimed an underpayment little evidence was led in that respect and no explanation regarding same was made. In the premises the claim for underpayment is dismissed.

32. After considering the Applicant's circumstances, that he was married and that at the time of his dismissal he had just had a second child born into his family and had worked for Respondent for almost 5 years, and that it took him a number of years to find

permanent employment after his dismissal, we consider it fair to award him 10 months salary as compensation for unfair dismissal.

33. Judgement is entered against the respondent for payment to Applicant as follows:

Notice Pay	**E 6360.08**
Additional Notice	**E 4625.44**
Severance Allowance	**E11563.80**
Compensation	**E63600.00**
	E96149.24

The Respondent is to pay the costs of the application.

The Members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT