IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 68/97

In the matter between:

MATHEWS HLANZE APPLICANT

AND

SWAZILAND DAIRY BOARD RESPONDENT

CORAM

C. PARKER : JUDGE

R. C. M. BHEMBE : MEMBER

D. P. M. MANGO : MEMBER

For the applicant : Mr. S. Sibandze

For the respondent : Mr. M. Sibandze

In this matter the applicant seeks relief for unfair termination of his services by the respondent, and claims compensation therefor, and also claims severance allowance, notice pay and additional notice pay. The respondent denies that the termination was unfair. It is the contention of the respondent that the termination was fair because the applicant admitted having taken a sum of E864.00 which belonged to the respondent for his own use instead of surrendering it to the respondent's cashier. And so the applicant's action amounted to a dishonest act in terms of section 36 (b) of the Employment Act, 1980 (Act No. 5 of 1980) (Employment Act), and taking into account all the circumstances of the case it was reasonable to terminate the services of the applicant. In the premiss, the applicant is not entitled to the claims he has prayed for.

The incident that led to the unresolved dispute which this Court is now called upon to determine took place on 24/25 November 1993. In the wee hours of 25 November 1993, the applicant who is a driver-salesperson of the respondent loaded stock unto his truck for the usual sale to certain of his customers. According to

entries in the sales summary stock book, he took away for sale 160 cases of emasi. But a check of the stock control sheet revealed that 40 cases of emasi were missing. According to the evidence of Mr. Gamedze (RW1), the supervisor of the driver-salespersons in the respondent's undertaking, all the driver-salespersons' books were checked. The check revealed that the relevant entries of the applicant's sales summary and cash slips did not tally. The check was conducted on 26 November 1993. On 29 November RW1 called upon the applicant to explain the imbalance, ie why 40 more cases of emasi were actually sold as compared to cases indicated as sold according to the sales summary. According to RW1, the applicant's response was that he had no knowledge of the discrepancy.

It is now not in dispute that the applicant sold 200 cases of emasi, ie 40 cases more than were reflected in his sales summary. It is also not in dispute that he brought back from selling the stock a surplus of E864-00, being the price of the 40 cases of emasi. It is equally not in dispute that the applicant did not declare this surplus to the cashier as he must do but kept the money on himself.

It is applicant's embezzlement of the E864.00 which ultimately led to his dismissal as the respondent

considered his action as a dishonest act.

The question that we must now determine is: is the termination of the services of the applicant fair? Thus the Court must decide whether upon the evidence presented to it, a) the respondent had a valid reason within the meaning of section 36 (b) of the Employment Act to terminate the services of the applicant? b) the decision to terminate met the fair procedure requirement under section 42 (2) (b) of the Employment Act? and c) whether, taking into account all the circumstances of the case it was reasonable to terminate the services of the applicant within the meaning of section 42 (2) of the Employment Act?

It is these questions that we must now answer.

From the totality of evidence presented to us there is not a modicum of doubt in our minds that the applicant appropriated the E864.00 belonging to the respondent, and he went about it in a very dishonest way. If the applicant did not have a crooked mind, and was minded to behave in an honest way, he would have simply handed all the money he realized from that day's sale to the cashier and indicated on the sales summary that there had been a surplus of cash from his sales. As RW1 testified, if he had done that there would have been no problem.

In our view, the applicant knew he had taken away for sale 40 more cases of emasi than were reflected in the sales summary. He knew what he was doing but in his

criminal mind he was praying that nobody would find it out. He was not honest with RW1 when he was first asked to explain the discrepancy on 29 November 1993. He was not honest in his answers in Exh 3, which we find he authored and signed. He appeared to have spoken the truth in Exh 4. But then his criminal mind had the better of him, and so he changed his tune in Exh 5, which tune he tried to sell to this Court, and which we reject as it is a blatant lie.

Because we find that the applicant appropriated the respondent's money for his own use and has been untruthful about it, we hold that the applicant is guilty of a dishonest act, and accordingly in our judgement the respondent had a valid reason within the meaning of section 36 (b) of the Employment Act to terminate the services of the applicant.

We now pass on to consider the requirement of procedural fairness.

We will continue to state ad nauseum the six minimum standards which must be met in order for a hearing to satisfy the requirement of procedural fairness. They were stated in Christopher H. Dlamini v Inter Africa Suppliers (Swd) Limited, Industrial Court Case No. 55/97 at p 7. Of course the list is not meant to be numerits clawus. There we had this to say -

While we do not expect an employer to handle disciplinary hearings according to the standards of a court of law (see Grogan, Riekert's Basic Employment Law. 2nd ed, p 102), we expect that certain basic procedures must be followed. Among these are: (I) The employer should advise the employee in advance of the precise charge or charges that he or she is to meet at the hearing. This requirement is tied up with the need for adequate preparation. (ii) The employee should be advised in advance about his right to representation, and the representative must be a representative of his or her choice, not imposed by the employer or any other person. (iii) The chairman or presiding official should be impartial. That is to say he or she must weigh up the evidence presented before him or her and make an informed and thought-out decision. There should be no grounds for suspecting that his or her decision was based on erroneous factors or considerations. (Iv) The employee must be given ample opportunity to present his or her case in rebuttal of the charge or charges preferred against him or her and to challenge the assertions of bis or her accusers, (v) The employee must be present at the hearing, and it is essential that everything possible is done to enable him or her to understand the proceedings, (vi) There should be a right of appeal, and this should be explained to the employee. (See Grogan, Ibid., pp 103 - 107.)

With respect, unlike Mr. M. Sibandze, for the respondent, we do not see anything wrong in an applicant employee taking "refuge", as he put it, in the requirement of procedural fairness and gaining something in the form of an award in this Court even where the applicant had been dismissed for "substantive misconduct". The employment law of Swaziland is abundantly clear in its terms under section 42 (2) of the Employment Act. Thus this Court, which is a pedant of equity, must insist on a substantial adherence to procedural fairness in every case, not only dismissal cases. And an employer who disregards procedural fairness when he decides to dismiss an employee does so at his own peril.

Doubtless, the breach of procedural fairness goes to the very essence and root of justice and fairness which are at the very core of Roman-Dutch common law jurisprudence, (See Devenish, Interpretation of Statutes, pp 38 - 43.)

Whether or not dismissed employees are quick to take advantage of such breach or take "refuge" therein is not the issue. The issue is that employers (and others) who conduct so-called disciplinary enquiries in breach of procedural fairness as explained in Christopher H. Dlamini must also not be allowed to get away with it or to take "refuge" in the fact that "substantive misconduct" has been proven. Such employers should also not be rewarded for such breach.

In hac casu we have no difficulty in finding that the so-called disciplinary enquiry conducted by the respondent is replete with highly prejudicial procedural irregularities. The hearing falls far short of the standards adumbrated in Christopher H. Dlamini.

The applicant was not given any notice - formal or otherwise - of the 9 December 1993 hearing or enquiry. It is true that an investigatory hearing had been conducted on 2 December 1993 (Exh 4) but there is nothing in Exh 4 to suggest that subsequently the applicant was made aware that he would attend a disciplinary enquiry or hearing. Exh 4, Exh 3 and Doc 1 are all investigatory reports which were then studied by RW3. From the evidence presented to us, we find that it took RW3 barely one hour to study all the relevant documentation on the matter and take a decision to call the applicant to a disciplinary hearing. Within barely one hour the applicant had been 'dragged' to a so-called disciplinary hearing. The applicant had not been informed - orally or in writing - what charge or charges he faced, despite the fact that according to RW 2's and RW3's own testimonies he faced a serious charge of which if he was found guilty he would be dismissed.

Neither indeed could the respondent had had time to inform the applicant of the charges since there was barely one hour between the time RW3 took the decision to conduct a disciplinary hearing and the time the hearing started.

The applicant was not informed of his right to representation although he faced a very serious charge for which he could suffer the ultimate sanction of dismissal.

The charge of bias or impartiality on the part of RW2 who took part in the hearing of 9 December 1993 is real. He was the same person to whom the chairperson of the 9 December hearing (RW3) recommended a dismissal. What kind of impartiality could the applicant expect from RW2 in such a situation? It is an irrefutable and a well-tested element of the requirement of natural justice and

fairness that one who takes part in the making of a decision that affects the interests or rights of a person in a forum a quo should not also take part in the making of the same decision a quern when at the latter level the decision made a quo is to be reviewed, and accepted or rejected.

It has not been shown in this Court by the respondent that the applicant was informed of his right to appeal. Neither has it been shown that the applicant was given an opportunity to appeal.

For the aforegoing, we hold that the respondent has not satisfied the procedural fairness requirement.

Referring to a passage in le Roux and van Nierkerk, The South African Law of Unfair Dismissal, at pp 165, Mr. M. Sibandze submitted that since the applicant has not suffered any prejudice the hearing should not be adjudged as unfair. We cannot accept that. The prejudice that the applicant has suffered is the mere fact that he was denied his right to a fair hearing and the recommendation of RW3 that he be dismissed was tainted with bias.

Relying on Ntsizi v Movenpick Restaurant (1992) 1 LCD 236 (IC) at 237, he submitted further that the irregularities are not so serious as to nullify the fairness of the procedure adopted by the respondent. What we have found to be wrong with the procedure adopted by the respondent are substantial and serious and not merely technical. In fact we do not see how Ntsizi can assist the respondent. In our view the opportunity given to the employee to state his case cannot be regarded as fair for the findings we have made above.

And SACCAWU & Another v King Williams Town Fast Food cc t/a Chicken Lichen (1996 LCD 38 (IC) is distinguishable because there a proper notice of the enquiry had been given to the employee, and in addition, the two irregularities complained of at 40 are not present in the present matter.

We are not persuaded by the authority in Botha v Italtile Centre (1992) 13 IL J 661. We are rather persuaded by the authority to which Mr. S. Sibandze, counsel for the applicant, referred us in Thwala v ABC Shoe Store, quoted in Rycroft and Jordaan, A Guide to South African Labour Law. 2nd ed, at pp 205-6. The reason is that it is in accord with the interpretation and application of section 42 (2) of the Employment Act. In Thwala, the industrial court (of South Africa) in emphasizing the importance of procedural fairness held that -

[N]atural justice is a process of value in itself. It is an end in its own right... It is so fundamental in the context of labour relations, said the court, that it 'should be enforced by [the] court as a matter of policy, irrespective of the merits of the particular case.'

And, indeed, the "approach in some earlier decisions, where the industrial court indicated that lack of procedural fairness does not by itself entitle the dismissed employee to relief, was thereby firmly rejected." (See Rycroft and Jordaan, ibid., p 206, and the cases there cited.)

We are fortified in our view by the dictum from Administrator, Transvaal v Zenzeli, quoted in Rycroft and Jordaan, ibid., p 207 -

It is trite... that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6 ed puts the matter thus at 533-4: "Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly."

From the passages we have set out above, we have formed the view that the raison d'etre of procedural fairness is to ensure that the merits of a case are kept apart from the procedure adopted, and that procedural fairness should be enforced substantially as a matter of policy, irrespective of the merits of the particular case.

For the aforegoing it is our judgement that the respondent has not satisfied the procedural fairness requirement under section 42 (2) (b) of the Employment Act.

We will now decide the last question which is: taking into account all the circumstances of the case was it reasonable to terminate the services of the applicant?

In this regard Mr. S. Sibandze submitted that it was not reasonable to terminate the services of the applicant because of: a) the long service of the applicant in the respondent's undertaken; and b) the fact that though the applicant's misconduct might be serious, that did not render the continued employee/employer relationship impossible.

And for these reasons, he further submitted, the respondent ought to have meted out a sanction other than dismissal, eg the applicant could have been suspended or demoted.

Mr. M. Sibandze, for the respondent, contended contrariwise. For him, dismissal was the most appropriate sanction because of the seriousness of the applicant's misconduct, and because of the nature of the business of the respondent which

involves the sale of stock and cash takings, it would not have been proper and appropriate to demote the applicant. Neither was suspension an appropriate alternative sanction.

We agree with Mr. M. Sibandze that suspension cannot be an appropriate sanction since the applicant had been found guilty of a dishonest act.

We said in Lucas Zwane v Tip Top Holdings, Industrial Court Case No, 77/95 at p 7.

A factor that may be taken into account by the Court in judging the reasonableness of the decision to dismiss is a long and unblemished record of good service. In such a case a written warning would be just

and equitable. (See Mhlume Sugar Company v Jabhane James Mbuli, Civil Appeal No. 1/91 at p 2).

But we also quickly added there (at the same page), "In our view one incident of serious and depraved misconduct and misbehaviour, like that which we found the applicant committed, is capable of cancelling any hitherto unblemished record of good service." In the present case the applicant's mandacity and his attitude towards the whole incident, as well as his lack of remorse should be held against him. We agree with RW3 and RW2 that what happened was not some forgiveable shortage for which the applicant would not have been dismissed but could have been made to pay back the shortage. The E864.00 represented a surplus of cash which the applicant dishonestly appropriated to his own use.

In our judgement therefore we are satisfied that it was reasonable to terminate the services of the applicant, considering all the circumstances of the case. In the result, it is our conclusion that the respondent has satisfied the requirement of reasonableness within the meaning of section 42 (2) (b) of the Employment Act.

From the aforegoing analysis and conclusions, it is our decision that the respondent has proved on a balance of probabilities that the termination of the services of the applicant was fair within the meaning of para (a) of section 42 (2) and under the requirement of reasonableness in para (b) of section 42 (2) of the Employment Act. But the respondent has failed to satisfy the requirement of procedural fairness in para (b) of section 42 (2) of the Employment Act. We will accordingly invoke the proviso contained in section 15 (4) of the Industrial Relations Act, 1996 (Act No. 1 of 1996) since we have found that the applicant's dismissal is unfair by reason of a procedural defect.

In Lucas Zwane we made the following conclusions in response to the applicant's claims for severance allowance and notice pay -

Upon a correct interpretation of section 34 (1) of the Employment Act we hold that he is not entitled to severance allowance on account of the fact that the respondent, as we have held, has satisfied the

requirement of section 36, read with section 42 (2) (a), of the Employment Act. (See Susan Dlamini v President of the Industrial Court and Melmans Pharmacy (Pty) Ltd, Industrial Court of Appeal Case No. 13/88 at p 5.)

It is our view that the same conclusion we have reached above concerning severance allowance may not be reached in all cases of fair dismissals under section 36, read with section 42 (2) (a), of the Employment Act with regard to notice pay (section 33 of the Employment Act) because the fact that an employer has a valid reason or "just cause" to dismiss an employee does not ipso facto mean that he is entitled to dismiss summarily.

But in the present case, we are of the view that the respondent was entitled to dismiss the applicant summarily taking into account the circumstances surrounding the dishonest act which, as we have said, was calculated and executed with a criminal mind. As Rycroft and Jordaan, at p 98, ibid, have said, dishonesty justifies summary dismissal.

In the result the applicant is not entitled to severance allowance and notice pay and additional notice pay.

In determining the quantum of compensation we should award to the applicant we have applied the proviso in section 15 (4) of the Industrial Relations Act, 1996 (Act No. 1 of 1996). But we do not agree with Mr. M. Sibandze that the amount of compensation awarded in Daniel Matsebula v Swaziland Milling, Case No. 14/97 should be awarded also in this case. In Matsebula the dishonest act of the applicant resulted in the respondent losing about E6,000.00. In the present case the respondent lost only E864.00.

We now make the following order which in our view is just and fair in the circumstances -

a) The respondent shall on or before 14 September 1998 pay to the applicant as compensation for procedurally unfair termination of the applicant's services, five month's wages ... E5,803.35

b) There will be no order as to costs. The two Members concur.

DR. COLLINS PARKER

JUDGE OF THE INDUSTRIAL COURT

31 August 1998