

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

(HELD AT MBABANE)

APPEAL CASE NO.: 14/2004

In the matter between

FIDELITY SPRINGBOK SECURITY
SERVICES SWAZILAND (PTY) LTD.

Appellant

and

JOSHUA MATSE

Respondent

CORAM:

J.P. ANNANDALE JP
J.M. MATSEBULA JA S.
B. MAPHALALA J A

For Appellant: Mr. S. Dlamini of Magagula & Hlophe Attorneys

For Respondent: Ms Zwane of Rodrigues and Associates

APPEAL JUDGMENT

27 February 2006

ANN AND ALE JP:

[1] This is an appeal against a judgment of the Industrial Court and involves the Industrial Relations Act, No. 1 of 2000 ("the Act").

[2] The appellant is a security company which employed several security guards including the respondent.

[3] The appellant dismissed the respondent and the respondent caused the matter to be brought before the Industrial Court. The Industrial Court found in his favour and the appellant noted an appeal to this court.

[4] The grounds of appeal are set out as follows in the notice of appeal:

"1, The Court a quo erred in law in finding that the Respondent was not given a lawful order by the Appellant's General Manager on the 1st September 2001 which the Respondent disobeyed is as much as there are no legal basis for contending that the said order had to be conveyed by the General Manager himself and not by an officer in a supervisory position to the respondent.

2. The Court a quo erred in law in finding that the Applicant was not dismissed for a reason permitted by Section 36 of the Employment Act in as much as it was common cause that the offence for which the respondent was found guilty is a dismissable offence in accordance with the Respondent's contract of employment and the Appellant's disciplinary code.

3. The Court a quo erred in law in the manner in which it evaluated the evidence before it resulting in it unjustifiably attaching much weight to the evidence adduced by the respondent whilst failing to attach proper weight to the

evidence of the appellant including its witnesses who had corroborated each other in all material respects.

4. The Court a quo erred in law in finding that the dismissal of the Respondent was procedurally unfair in as much as:

4.1 There are no allegations in the Respondent's application in the Court a quo that there was any procedural unfairness in the dismissal;

4.2 The Court furthermore found it unnecessary for Appellant's counsel to address it on that aspect of the matter during submission as it expressed it was satisfied that there had been procedural fairness."

[5] The crux of the appellant's case was that a lawful order was given to the respondent and that the respondent disobeyed it and that the appellant was thus lawfully dismissed.

[6] After his dismissal the appellant took the matter up further and the Industrial Court ruled in his favour and made a total award in his favour in the amount of E12,214.00 and ordered the respondent to pay the appellant's costs.

[7] The appellant was in the employ of the respondent as a security guard and the appellant worked as a member of a "cash crew" being a group of security guards which accompanied cash in transit.

[8] The facts of the matter were conveniently and correctly summarised by the court *a quo* in its judgment and I quote *verbatim* the relevant passage as

it appears on pages 64-66 thereof:

"Upon a careful analysis of the evidence by the Respondent's witnesses and that of the Applicant the court has found the following to be factual:

- 1. That the guards ordinarily worked form 6 a.m. to 6 p.m. (12hrs) for six days. That is from Monday to Saturday.*
- 2. That the cash crew was occasionally released early by the Managers if there as no more work to be done.*
- 3. That the cash crew transported cash to and from the banks and the banks at the material time closed at 11.00 a.m. on Saturdays.*
- 4. That security guards as well as the cash crew could not perform their duties without uniform.*
- 5. That on the 1st September 2001 the Applicant was a cash crew security leader. He had two security guards and had arrived at the station at Matsapha around 11.00 am.*
- 6. That the Applicant as at the time the General Manager called for personnel to go to the Airport was in civilian clothing. His uniform was in a paper bag.*
- 7. That none of the Respondent witnesses checked to see if the uniform was wet or not.*
- 8. That none of them could positively deny that the Applicant had asked to be given time to go and collect spare uniform at home since his was wet.*

9. *That the General Manager did not directly give instructions to the Applicant to go to the Airport nor did he listen to his story before he suspended him on the material day.*

10. *One cannot rule out the possibility that the Applicant had already washed his clothes.*

11. *Mr Magagula, the manager who was said to have released the Applicant and his crew was not called to testify and no explanation for his absence was given.*

12. *Out of the crew of three (3) the Applicant and Hlatshwayo were dismissed for defying lawful instructions yet there was no explanation as to why the third member of the crew was not disciplined.*

From the totality of the above the court has come to the conclusion that upon arrival at the station, the Applicant and his cash crew were informed that they could go home by Prince Maseko on instructions of Mr Magagula. This explains why the Applicant had washed his uniform and one of his colleagues had gone home.

That no direct instruction was received by him from the General Manager and the explanation he gave to his colleagues for inability to join them was reasonable in the circumstances of the case. The General Manager missed a good opportunity to immediately get the facts from the Applicant on the material day and was out of order to suspend him without hearing his side of the story.

The evidence by the Respondent's witness appear to be orchestrated especially in denying that the Applicant had washed his uniform yet none of them had bothered to check if indeed that was the case. The court finds

that these witnesses especially Prince and Ndlovu were not candid with the court on this issue.

The Respondent has in the circumstances of the case failed to prove that the Applicant was given a lawful order by the General Manager on the 1st September 2001 and that the Applicant had disobeyed the order.

Therefore the Applicant was not dismissed for a reason permitted by Section 36 of the Employment Act. The dismissal was both substantively and procedurally unfair considering all the circumstances of the case outlined herein.

Though obeying orders in the security services is of essence and goes to the root of the business, orders by supervisors must not only be lawful but must be reasonable and capable of compliance.

An employee cannot be said to have defied an order that clearly he was not in a position to comply with. A security guard cannot be stationed at the busy Matsapha Air Show if he is not in uniform. The Applicant had washed his uniform upon being given authority to knock off by a Line Manager. He ought to have been given opportunity to explain his predicament before he was inhumanely suspended on the spot."

[8] Having studied the evidence and having compared it with the quoted findings of the court *a quo* I am satisfied that the court *a quo* was warranted to make those findings. Had it concluded otherwise, it certainly would have erred.

[9] I have carefully studied the record of the appeal and am satisfied that

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the court *a quo* correctly made the factual and other findings which I have quoted extensively the above. The facts of the matter are straightforward and uncomplicated. The employer acted capriciously, unwarranted and unfairly, as was correctly found by the trial court. It was unwarranted to appeal against the inevitable finding of the court below.

[10] I thereafter considered the grounds of appeal and carefully considered argument of both the appellant and respondent. I am satisfied that there are no merit in any of the grounds of appeal and that the appeal should be dismissed with costs.

[11] I accordingly make the following order:

The appeal is dismissed with costs.

J.P. ANN ANDALE
JUDGE PRESIDENT OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND

I AGREE

J.M. MATSEBULA
JUDGE OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND

I AGREE

S.B.MAPHALALA
JUDGE OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND