

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO. 58/90

In the matter between:-

|                    |     |            |
|--------------------|-----|------------|
| MATHEW GAMEDZE     |     | APPLICANT  |
| and                |     |            |
| MANZANA ESTATE LTD |     | RESPONDENT |
| QUORRAM:           |     |            |
| MR. S.M. BANDA     |     | PRESIDENT  |
| MR. V. DLAMINI     |     | ASSESSOR   |
| MR. A. MATSEBULA   |     | ASSESSOR   |
| MR. A. LUKHELE     | FOR | APPLICANT  |
| MR. FLYNN          | FOR | RESPONDENT |

JUDGEMENT

The Applicant in this matter is claiming compensation for his unlawful dismissal from his employment by the Respondent. Briefly outlined the Applicants claim is made up as follows: -

|     |                                                        |          |
|-----|--------------------------------------------------------|----------|
| (a) | One month notice pay                                   | E315.00  |
| (b) | Additional Notice pay<br>(7 x 4) days x E13.13 per day | E367.64  |
| (c) | Severance Allowance<br>(7 x 10) days x E13.13 per day  | E919.10  |
| (d) | 6 months wages<br>(in lieu of re-instatement)          | E1890.00 |
|     | TOTAL                                                  | E3491.74 |

The Respondent in its reply denies that the dismissal was unlawful and claims that the Applicant was dismissed for threatening his superior.

The history of this case is as follows:-

On the 1st of December 1980 the Applicant was employed by the Resopondent as a waiter.

2

On the 22nd May 1989 the Respondent wrongfully unlawfully and unfairly dismissed the Applicant from his employment on an allegation of theft and of threatening his superior without paying him his employment benefits.

At the time of his dismissal the Applicant was earning E315.00 per month.

The Respondent on the other hand denied that it had unlawfully and unfairly dismissed the Applicant and further denied that it dismissed him on an allegation of theft.

The Respondent admits that it dismissed the Applicant for threatening his superior and avers that he did so in a menacing manner.

The Applicant was disciplined in June 1988 for similar conduct towards his superiors.

Respondent denies that it dismissed the Applicant unfairly and avers that it dismissed him fairly under the provisions of paragraph (b) of Section 36 of the Employment Act No. 5 of 1980.

The Applicant in the premises is not entitled to payment if any of the moneys claimed in his application.

The Applicant testified in court in support of his claim. The Applicant stated that he was dismissed on the 22nd May 1989. On the 18th May 1989 there was a party at the Ezulwini Sun Hotel and it was outside the building. The Applicant and Isiah Dlamini were serving food. There were some speeches made at the party using a public address system.

At the end of the party they took back all the vessels and implements which

3

were used during the party. Applicant then got into a workshop. Johannes Ndlangarnandla confronted him there. He asked the Applicant whether he had not seen the microphone. Applicant said he did not see it. This was one of the microphones used during the party. Johannes Ndlangarnandla told the Applicant that the microphone was missing and the police were called. These are the company security officers. These officers came and searched the Applicant. They did not find the microphone. Applicant was then taken to the Spar Security Office. Before they reached the office they met Mr. Rosenberg the General Manager of the Respondent company. Applicant asked Mr. Rosenberg at the restaurant if he had ordered the security officers to come and search his person. His reply was that the officers were sent by him. Applicant told Mr. Rosenberg that he was going to take some steps towards that act. He meant to sue him legally for the false allegation of theft.

Mr. Rosenberg wanted to know what Applicant meant by that. Applicant told him that he intended suing him.

The people present during this discussion were Mr. Mncina an Assistant Manager, Mr. Zikalala Manager at Lugogo and 3 security officers.

Applicant was then taken away to the security office at Spar. Applicant stated that there were no threats said to Mr. Rosenberg except that Applicant promised to sue him. There was nothing Applicant did as an assault or threats of assault except that Applicant pointed at Mr. Rosenberg with his hand clenched when uttering the words of taking a legal action against him.

On the 22nd May 1989 applicant was called to a meeting. He attended.

In the meeting all that was said was that Applicant spoke with Mr. Rosenberg and the issue of theft was not raised.

4

Mr. Rosenberg was present in the meeting. The works council Committee was present. It was at the end of the meeting that Applicant was dismissed. He was told by Mr. Rosenberg that he was dismissed. He was dismissed by Mr. Rosenberg. It was just a decision by Mr. Rosenberg. The works council recommended that he pardons the Applicant. The finding of the works council committee was that

Applicant was guilty of threatening Mr. Rosenberg but made some apologies to Mr. Rosenberg on Applicants behalf.

After this meeting Applicant was dismissed. Applicant denies the allegation that it was not the first time he had threatened his superiors.

During the month of June 1988 one of the Headwaiter whose name Applicant had forgotten found him in the toilet and told the Applicant that he was a fool and that Applicant had left the guests and customers in the restaurant and went to the toilet to sit there. Applicant replied to the Head waiter that he too was a fool.

Applicant was called by the works council committee in June 1988 to discuss this issue. Applicant was subsequently suspended after the decision of the works council committee. Applicant was suspended for two weeks.

After his dismissal Applicant made a report to the Labour Commissioner. Matter was not resolved.

Applicant is alleging that the Respondent unfairly wrongfully and unlawfully dismissed him from employment on the pretext that he had stolen property of the company and threatened his superiors. There were no terminal benefits paid to him except for a salary for the month of May 1989 and it was for the number of days worked in the month of May.

5

Applicant is now claiming for the payment of:-

|     |                                          |          |
|-----|------------------------------------------|----------|
| (1) | One month notice                         | E315.00  |
| (2) | Additional Notice                        | E367.64  |
| (3) | 6 months wages in lieu of re-instatement | E1890.00 |

Applicant is married and has four minor children.

The Respondent called two witnesses in support of its Defence these were -Mr. Donald Mukabela defence witness 1 and Mr. Jeff Rosenberg defence witness 2.

Mr. Mukabela testified that on the 18th May 1989 he was on duty. He received a call from Mr. Rosenberg the General Manager. He proceeded to Ezulwini. He was informed that a microphone was missing. He asked who were working at the time and was told Applicant was one of them. Applicant was a waiter. He asked Applicant about the microphone. Applicant said he knew nothing. He took applicant to the applicants locker to search him and his locker. He found nothing. He took applicant to the security office. On their way they met Mr. Rosenberg the General Manager. They met him at the restaurant. Applicant was with DW 1 Applicant talked to Mr. Rosenberg shouting. Applicant told Mr. Rosenberg I will get or fix you. It is possible that the Applicant said I will deal with you pointing at Mr. Rosenberg. Mr. Rosenberg asked him to repeat and he said I will deal with you.

It is not true that applicant told Mr. Rosenberg that I am going to sue you. Mr. Rosenberg testified that on the 18th May 1989 there was a function at the pool side and a public address system was used at the function. It was reported to him that a microphone used at the function was missing. He called in security. They arrived and wanted to see those who were on duty. Applicant was on duty. DW 1 was a security officer who came. He saw the applicant later in the evening. DW 2 was standing at the entrance to the

6

restaurant. Applicant was brought passed on the way to the Security office. As they walked past him

Applicant pointed a finger at DW 2's face. Applicant's finger virtually touched DW 2's nose. DW 2 was shocked at Applicant's attitude and asked him to repeat it. Applicant repeated it. DW 1 was present when this happened. Applicant did not say he was going to sue DW 2.

There was an inquiry in the matter on the 22nd May 1989 Applicant was suspended on 18th May 1989. What was inquired into was the Applicant's threatening attitude towards a senior member of management. Inquiry was about the threat.

Applicant was at fault. Conclusion to terminate his services. There had been previous incidents in which the Applicant was involved.

It is common cause that the following facts are agreed.

- (1) The applicant was employed by the Respondent on the 1st December, 1980.
- (2) On the 18th May 1989 there was a party at the Ezulwini Sun Hotel and Applicant was serving food.
- (3) A microphone used on the public address system got , lost.
- (4) Applicant was one of the suspects and was searched by Security officers.
- (5) The Applicant told Mr. Rosenberg the General Manager whilst pointing his hand at him I will deal with you.
- (6) The Applicant was dismissed on the 22nd May 1989 for threatening his superior.
- (7) The applicant was paid for the days he worked in May 1989.
- (8) The applicant was not paid
  - (i) One month notice pay
  - (ii) Additional Notice pay
  - (iii) Severance allowance
  - (iv) 6 months wages compensation.

7

It is the Applicant's case that he was dismissed unfairly. The Respondent deny this allegation and state that the applicant was dismissed for threatening his superior on the 18th May 1989.

In his evidence the Applicant conceded under cross examination that he did not tell Mr. Rosenberg that he was going to take some steps towards that act. He meant to sue him legally for the false allegation of theft. Applicant conceded that he told Mr. Rosenberg that he was going to deal with him whilst pointing a clenched fist at him.

DW 1 confirmed that applicant told Mr. Rosenberg I will deal with you whilst pointing a finger at Mr. Rosenberg.

DW2 also confirmed that Applicant whilst being lead by DW 1 painted a finger at him and said I will deal with you. Both DW 1 and DW 2 state that the Applicant repeated this statement twice.

This is the crux of this action. This court is being called to upon to determine whether Applicant told a

senior member of management his superior that he would deal with him.

This question begs the issue for the Applicant in court admitted that he told DW 2 his superior that I will deal with you. The only issue that remains to be resolved is whether the instant dismissal that was meted out against the applicant pursuant to Section 36 (b) of the Employment Act was properly so effected.

Evidence was lead by the Defence showing that in 1984 the applicant was disciplined for fighting on hotel premises. Refer to exhibit D5. On 21st June 1988 the Applicant was suspended for 10 days for insulting his superiors. Refer to exhibit D1. Applicant conceded that the incidents referred to in

8

exhibits D1 and D5 were correct. That he insulted his superior. That he fought on hotel premises.

At the time of his dismissal the Applicant was earning E315.00 per month. The dispute was reported to the Commissioner of Labour who failed to resolve it and issued the certificate of unresolved dispute.

The question is, was the Respondent wrong in dismissing the Applicant summarily pursuant to Section 36(b) of the Employment Act. It has been submitted that it was wrong for DW 2 to have participated in the process of discipline as he was the aggrieved party. That by dismissing the Applicant DW 2 became a judge in his own case contrary to the rules of natural justice.

It has been submitted on behalf of the Respondent that all the rules of natural justice demand of the Respondent is that he should give the Applicant an opportunity to make representations before action is taken against him. Having taken account of the Applicants previous record the Respondent discharged the onus placed on him by Section 42 of the. Employer can action a threat without having a previous warning. It is not necessary that all matters referred to in Section 36(b) of Employment Act should be present in every incident before the employer can terminate an employees employment.

The acts referred to in Section 36(b) Employment Act are different acts, separate acts.

We come to the other issue raised namely that DW 2 Mr. Rosenberg was an interested party and should not have participated in the disciplinary of the Applicant. The Respondents have referred the court to The New Labour Law, strikes, dismissals and the unfair Labour Practice in South African Law at page 81 Line 28 to page 82 line 9 and we quote.

9

An employer is not in the same position as a judge, an administrative tribunal or a public servant. When he disciplines an employee he is no dispensing justice or discharging a public duty but taking action to protect his interests. He is an interested party and cannot be expected to be the model of dispassion and impartiality. One can illustrate the point by taking the rather unlikely example of an employee who out of the blue stabs his employer with a knife. He may have been seized by an epileptic fit, for example. He may also have some telling things he could say in mitigation. But the employer cannot be criticised if on the heat of the moment he dismisses him out of hand"

In short therefore Mr. Rosenberg was legally empowered and entitled to hear and decide the fate of the applicant. The fact that the threat was made to him does not preclude him from discharging his role as an employer.

We have further been persuaded that the act of disciplining the applicant for an act of threatening his superior was too harsh and that the employer should not have referred to the previous punishments perpetrated by the Applicant as he had already served such punishment. In response the Respondent submitted that reference to previous incidents on the record of the Applicant was to decide whether he should be the subject of a lenient punishment and in any case the threatening of a senior member of

management entitled Applicant to instant dismissal. We have been referred to same The New Labour Law hereinbefore referred to at page 436 line 4 to line 17 and we quote.

"As regards the question whether the action complained of is sufficiently serious to justify dismissal it may as a general rule be stated that the taking of severe action by an employer is in principle not questionable although it should not be too severe in the circumstances of the case. In some of the cases before the court the penalty of dismissal was found to be too

10

severe. Normally this is also the position where mere threats of assault have been uttered except possibly where threats are uttered against a senior employee."

"Compliance with the principles of procedural fairness have also been emphasized in these types of cases- The court takes into account and may even investigate previous incidents and warnings,"

The applicant in the current case threatened a senior employee of the Respondent, Applicant has not shown us any law that permits him to do so.

This court will be failing in its duty if it is to allow employees of the Applicants conduct and temperament to continue in employment. This court will not be safe guarding industrial relations if it protects employees of Applicants degree of discipline. This court will be harnessing Industrial unrest if employees of Applicants conduct were paid the terminal benefits now sought by the Applicant.

It is the decision of this court that the Applicant was properly dismissed by the Respondent in keeping with Section 36(b) of the Industrial Relations Act. The Respondent has discharged the burden of Section 42(2) of the Industrial Relations Act.

The Applicants claim is accordingly dismissed.  
My assessors concur with this decision.

MARTIN S. BANDA

INDUSTRIAL COURT PRESIDENT