

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 290/99

In the matter between:

BHEKUYISE SHONGWE

APPLICANT

and

MATATA GARAGE

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

THULANI DLAMINI

FOR RESPONDENT:

MUSA SIBANDZE

JUDGEMENT

26/09/02

The application is one for determination of unresolved dispute commenced in terms of Section 58 (2) of Act No. 1 of 1996 in 1999.

As per the particulars of claim, the Applicant was employed by the Respondent company on the 28th July, 1997 and was in continuous employment until the 18th January, 1999 when he was verbally dismissed on allegations of having taken part in a dishonest act, in that he filled two gas cylinders instead of one, and was personally paid for the second gas cylinder to the financial prejudice and detriment of the Respondent.

The Applicant avers that the dismissal was unfair and unlawful in that the Respondent relied merely on a suspicion of theft without sufficient proof.

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In court, inspite of his contention in the pleadings that he had received money for a cold drink from the customer, the Applicant changed his defence stating that he did not receive any tip at all from the customer nor did he fill the second gas cylinder but merely weighed it and informed the customer that it still was almost full. He refutes the evidence of RW1 Sabelo Ndlovu that he was close enough to monitor the transactions he did.

The Respondent in its initial reply to the application denied that it dismissed the Applicant asserting that the Applicant absconded from work after he was confronted about the theft by RW1 and RW2.

The Respondent on the day of the hearing amended its reply stating that the Applicant was dismissed and that his conduct justified dismissal and he was dismissed without a hearing because he absconded from work after the initial confrontation by RW1 and RW2.

RW1 told the court that as a security guard, he was on patrol around the shop on the material day. That he

saw a young boy go to the shop with two gas cylinders. That he also saw the Applicant fill both gas cylinders but when he confronted the boy whilst he was in a mini bus on his way from the shop to produce the payment slip, it only reflected only one gas cylinder had been paid for. He then confronted the Applicant who denied the charges and resisted arrest. He was nevertheless with the assistance of a fellow security guard able to apprehend him and took him before RW2 Mr. Holley. That Mr. Holley searched the Applicant and recovered E12.35 from his pocket. He added that he could tell that the second cylinder was filled because he saw the Applicant attach a pipe to it, a contention refuted by the Applicant. He said he suspected theft because the boy took only one cylinder to the counter to pay. He did not see the Applicant take money from the boy but the boy admitted giving him money to RW2 Mr. Holley. Police were called and arrested the Applicant and took both gas cylinders from the boy.

On the other hand, RW2, Mr. Hunt Holley told the court that when the Applicant was brought to him, he had a sum of money in his pocket but he could not recall the exact amount. He denied telling the conciliating officer, at the Labour office that he had received from the Applicant money equivalent to the price of the gas filled.

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He also denied contrary to what RW1 had told the court, that the boy was brought to him and that he had interviewed him and he had admitted giving money to the Applicant. He said he did not interview the boy at all.

He further told the court that he was not able to establish as a matter of fact if there was gas stolen from the metre reading as this would have taken time to establish.

The court has been asked to treat the evidence of RW1 with caution due to the apparent contradictions with the evidence of RW2.

The Respondent bears the burden of establishing that:

1. It dismissed the Applicant for an offence permitted by Section 36 of the Employment Act.
2. That it was fair and reasonable to dismiss the Applicant considering all the circumstances of the case.

To determine the first issue, the court has to consider whether the Respondent's contention that the Applicant did steal gas was reasonably, probably true. In this regard we take into account the explanation by the Applicant that he had weighed the second gas cylinder and had advised that it still had its contents and did not refill the same vis a vis the evidence of RW1 and RW2. The credibility of the Respondent's witnesses and the veracity of their testimony is crucial in this regard.

The other consideration is the admission by the Applicant in his pleadings that he had received a tip from the customer which he purported to retract in his evidence before the court. The Applicant told the court that he had infact instructed the Attorney that he did not take any money from the boy, but the attorney had asked him why the Labour Officer stated so in the certificate of unresolved dispute. It is a possibility therefore that the previous attorney simply relied on the contents of the CUD to draft the plea.

The application to withdraw the admission contained in paragraphs 6 and 9 of the particulars of claim by the attorney for the Applicant was refused by the court on the grounds that sufficient grounds on affidavit had not been set out to explain why the admission ought to be withdrawn from the pleadings. It must be noted however that the averments do not amount to an admission of theft of gas.

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The short comings of the Respondent's evidence are as follows: The two gas cylinders were not weighed to establish if both were full upon apprehension of the Applicant and the customer. The two

witnesses contradicted each other as to whether the boy admitted that the two cylinders were filled with gas and that he had paid some money to the Applicant, Mr. Holley stated that he never interviewed the boy at all whereas the security guard told the court that Mr. Holley had in fact interviewed the boy and had obtained this information. This puts the veracity of the evidence of RW1 and RW2 into question. Their credibility is thus suspect.

It is most probable that the guard did not see the Applicant fill the gas but was merely suspicious, a fact explained by that he had to follow the boy to the bus stop to apprehend him. If he had witnessed the filling and non payment as he explained, he would have apprehended the boy immediately before he could leave the shop.

The Applicant being a gas attendant and evidently of little education, it is probable that the previous attorney had misrepresented his instructions as to whether or not he had received any money from the boy for a cold drink. The issue goes to his credibility as he bears no evidential burden to disprove his guilt.

The Applicant was not prosecuted for the theft in spite that he was temporarily apprehended and the gas cylinders were still in the possession of the Police up to the time of this trial.

The court finds that the Applicant, considering all the circumstances of the case and the manner in which the investigation was conducted was dismissed for mere suspicion of theft. The two witnesses of the Respondent have failed to discharge the onus borne by the Respondent in terms of Section 42 (2) (a) in that they have failed to show that the Applicant was guilty of theft and therefore was dismissed in terms of Section 36 (b) of Act No. 5 of 1980.

Mere suspicion is not sufficient to discharge this onus.

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The applicant's demeanor in court was not suggestive of an elusive witness. He was forthright and appeared surprised when asked about the admission in the particulars of claim. He explained that he had told the attorney that he had not received any money from the customer but the attorney had queried why the certificate of unresolved dispute showed otherwise. This is not however an admission that he had stolen the gas. It does not go to the core of the offence alleged but had the potential of fatally wounding his credibility. This however in the court's view did not happen.

RW1 did not adduce evidence that he saw the Applicant receive money. The only evidence available was that the Applicant had a sum of money in his pockets which led to the suspicion by the employer. He denied that he had admitted the offence as stated by Mr. Holley. The Applicant had about E60.00 in his pocket, whereas the gas would have cost about E22.00 according to his evidence.

The Applicant had worked for the Respondent from 28th July, 1999. He had no previous record of misconduct nor had he been accused of poor work performance in the past. No hearing was held to determine his guilt or otherwise before he was dismissed. The court is not satisfied that he had admitted the offence, nor was he caught red-handed to warrant a summary dismissal without a hearing.

In the circumstances, the respondent has also failed to show that it was fair and reasonable to dismiss the Applicant having in the first place failed to establish his guilt on a balance of probabilities.

The Applicant was still jobless. He had suffered financial loss and difficulties occasioned by the job loss. He was not prosecuted to date for the alleged charges and the same was still hanging over his head. Respondent worked diligently for a period of one year and five months and seeks notice pay, leave pay and compensation for unfair dismissal. He earned E600.00 salary per month at the time of his dismissal.

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Considering all the outlined circumstances of the case, we award the Applicant:

(a)	Notice pay	E 600.00
(b)	Leave pay	E 415.44
©	Six months compensation	E3660.00
	Total	E4,615.44

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT