IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 102/2002

In the matter between:

PETROS DA SILVA APPLICANT

And

PLASCON PAINT SWAZILAND (PTY) LIMITED RESPONDENT

CORAM:

NDERINDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : S. SIBANDZE

FOR RESPONDENT : ADV. P. FLYNN

JUDGEMENT ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE APPLICANT'S CASE - 14/09/04

The Applicant brought an application for determination of an unresolved dispute in terms of Section 85 (1) of the Industrial Relations Act No. 1 of 2000 and the Industrial Court Rules of 1984.

In the Particulars of Claim, the Applicant avers that he was employed by the Respondent as a Sales Representative from the 1st July 1991 and was in continuous employment until the 2nd October 2001.

He further contends that the dismissal was both substantively and procedurally unfair and was unreasonable in all circumstances of the case especially because the disciplinary hearing was malafide and contrived to justify the unfair dismissal.

At the time of dismissal, he earned a monthly salary of E7,070.00 and was a Sales Manager at the time.

He reported the dispute to the Labour Commissioner who was unable to resolve it and a certificate of unresolved dispute was issued.

He claims maximum compensation for the unfair dismissal in the sum of E84,840.00, Notice Pay in the sum of E7,070.00, Additional Notice of E12,726.00 and Severance pay of E31,720.00.

The hearing commenced in earnest and the Applicant in terms of the Court Rules testified in support of the Particulars of Claim as outlined above.

In the evidence in chief he told the court that he was entitled to use a company motor vehicle to and from home and in the cause of duty .

He said that no mileage limit was imposed on the use of the motor vehicle until when this was done by a new manager with whom he had a very bad working relationship in the name of Pier Vander Pole in the year 2000.

He said that a maximum of 4,000 kilometres per month was accordingly imposed. He was a Sales Manager and also acted as a sales representative. He

was on the road permanently. The mileage during this period went up between 5,000 to 6,000 kilometres per month.

The Applicant added that he used the motor vehicle for his personal errands during weekdays and over the weekends. He traveled regularly to Mozambique where his wife resided and made various trips to different destinations in South Africa.

Under cross examination he conceded that it was company policy that he was supposed to seek permission from his superiors before using the vehicle for personal errands especially outside Swaziland. He conceded that he was made aware of the new 4,000km monthly limit but did not stick to it because he had a poor relationship with the superior.

The months after the limit was imposed saw the mileage skyrocket from month to month up to plus or minus 10,000 km in the month of August 2000.

He admitted that most of this mileage was on personal errands in and out of Swaziland and had sought no permission prior to embarking on specific journeys referred to him under cross examination.

The Applicant admitted that he was dismissed after a disciplinary hearing was held wherein he was accused of excessive misuse of company car whilst in a position of trust. He had admitted the gross misuse during the disciplinary hearing and only sought to blame it on the failure by the company to query or warn him of the abuse prior to the disciplinary hearing that led to the dismissal.

It is trite that in terms of Section 42 (1) of the Employment Act No. 5 of 1980, once an employee has established that he was an employee to whom Section 35 of the Act applied, the employer had in terms of Section 42 (2) (a) and (b) to

prove that the employee was dismissed for a reason permitted by Section 36 of the Act and that it was fair and reasonable for the employer to dismiss him taking all the circumstances of the case into consideration.

Put it another way, the employee has no evidential burden to prove that he was unfairly dismissed. The burden lies with the employer to show that the dismissal was fair.

At the close of the Applicant's case, Advocate Patrick Flynn for the Respondent submitted that by his own admission the Applicant had satisfactorily shown that he was dismissed for a reason permitted under Section 36 of the Employment Act, and that the dismissal was fair in the circumstances. That it was therefore unnecessary for the Respondent to call any evidence to that effect since the evidence elicited from the Applicant satisfactorily absolves the Respondent from any wrong doing in terms of the Employment Act. Accordingly the court should absolve the Respondent from the instance.

The Civil Procedure in the Supreme Court by Harms at page B-285 deals with rules B.39.6 and 39.7 of the Supreme Court Rules. The rules deal with application for absolution from the instance at the close of the Plaintiff's case and the judgement of the court thereof.

The Industrial Court Rules of 1984, do not provide for such procedure but in terms of Rule 10 (9) thereof, where the Industrial Court Rules do not make provision for the procedure to be followed in any matter before the court, the High Court Rules shall apply to proceedings before the court with such qualifications, modifications and adaptations as the President may determine; and where in the opinion of the President, the High Court Rules cannot be applied in the manner provided for in paragraph (9), the court in terms of 10 (b) may determine its own procedure.

The relevant High Court Rule is 39 (6) which reads as follows:

"At the close of the case for the Plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one counsel on his behalf may address the court and the plaintiff or one counsel on his behalf may reply. The defendant or one counsel on his behalf may thereupon reply on any matter arising out of the address of the plaintiff or his counsel."

This provision is on fours with the Supreme Court Rule B 39.6

According to Harms, "the test to be applied by the court at this stage of the trial is: Is there evidence upon which a court might reasonably find for the plaintiff?" See Gordon Llovd Page and Associated v Revera f2000) 4 All SA 241 (A); Gascoyne v Paul and Hunter 1907 TPD 170.

The court has a discretion to grant or refuse absolution from the instance. In the exercise of this discretion it will normally not have regard to the credibility of witnesses unless the plaintiff's witnesses are so obviously lying or have so palpably broken down that the court cannot reasonably place reliance upon them.

The court may also have regard to the possibility that the Plaintiff's case maybe strengthened by evidence emerging during the defendant's case. See Harms page 285.

As stated earlier, though the plaintiff commences adducing evidence before the Industrial Court, the burden of proving that the dismissal of the Plaintiff was fair squarely lies with the Defendant (employer) in terms of Section 42 (2) of the Employment Act.

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This creates a peculiar situation where the party commencing adducing evidence virtually bears no evidential burden on the merits of the case as to whether he was substantively and procedurally unfairly dismissed.

Advocate Flynn recognizing this difficulty submitted that where the Plaintiff (employee) through his own admissions, has virtually, made out the case for the defendant (employer), then there is no need at all for the defendant to adduce any further evidence to show that the Plaintiff was substantively and procedurally dismissed fairly.

Upon a careful analysis of the testimony by the Applicant, he has admitted before court that he had extensively used the company car on his own errands without any authorization from his superiors.

He admitted further that he had exceeded the mileage limit placed on him by his superiors deliberately because he was in bad relationship with the immediate superior.

He admitted that he had not contested these issues at the disciplinary hearing that found him guilty and dismissed him. He was granted opportunity to appeal the dismissal but the decision was confirmed.

There is no doubt that the Applicant has placed evidence before court which clearly shows that he was dismissed for a reason permitted by Section 36 of the Employment Act and that due to his gross abuse of the motor vehicle and insubordination, while he was in a position of trust, it was fair and reasonable to dismiss him. It would accordingly serve no purpose to call upon the Respondent to testify and the Respondent company is absolved from the instance.

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No order as to costs. The members agree.

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