

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 334/2002

In the matter between:

LINDIWE DLAMINI

APPLICANT

and

SWAZI CANDLES (PTY) LTD

RESPONDENT

CORAM

N. NKONYANE: ACTING JUDGE

G. NDZINISA: MEMBER

D. MANGO: MEMBER

FOR APPLICANT: M. DASILVA

FOR RESPONDENT: M. SIBANDZE

JUDGEMENT -19/05/05

This is an application for determination of an unresolved dispute in terms of Section 85 of the Industrial Relations Act, No 1 of 2000.

The applicant is seeking an order for re-instatement and payment of arrear wages from date of dismissal to date of re-instatement or alternatively payment of notice pay, additional notice pay, severance allowance and maximum compensation.

The applicant was employed by the respondent on 29.06.1992 as a candle maker. She was in continuous employment by respondent until she was dismissed in March 2002.

The applicant says in her papers that the respondent dismissed her on the basis of allegations that she stole six candles. The applicant denied that she stole the candles.

She reported a dispute to the Commissioner of Labour. The Commissioner of Labour accordingly transmitted the matter to the Conciliation and Mediation and Arbitration Commission (CMAC). The appointed CMAC Commissioner could not resolve the dispute and a certificate of unresolved dispute was issued dated 16th May 2002 and it is annexed to the applicant's application.

The applicant was the only witness for her case. For the respondent three witnesses were led before the court.

The applicant told the court that on 13/03/2002 after she had finished work, she took her bag and went out to wait for the bus. She said the security guard, Nkosinathi Gama searched her bag but did not find anything. She said whilst still waiting for the bus the security guard came to her and told her that the lady that she was working with was calling her. She went to the office where that lady was. In that office she was asked if she knew anything about the six candles that were in front of the lady that had called her . She said she told her that she did not know anything about the candles.

The name of the lady that called her was Anne Leibrandt.

The applicant said she came to work on the following day, 14/03/2002 and nothing was done to her.

She said on Friday 15/03/2002 at about 1:00 P.M. she was called by management and was asked if she knew anything about the candles, and she told them that she did not know anything.

She said management told her that it had been discovered that the candles were stolen by her.

She was told to go home and return on Monday to collect her salary.

The respondent's case was that the applicant was on that day, 13/03/2002, given twenty-four church candles on which she was to work on and put a colour print on them. She however managed to finish eighteen candles and six remained which were found in the applicant's bag wrapped with an apron.

RW1 Nkosinathi Gama told the court that after she had searched the workers on that day, he began to patrol the premises of the company. He said he then found the applicant's bag wrapped with a piece of cloth containing the six church candles.

RW1 said he knew that the bag belonged to the applicant as she had come with it in the morning. RW1 said he confronted the applicant about the found property, and she told him that she was tempted. RW1 told the court that the applicant also admitted before the management that it was her who stole the six candles and asked for forgiveness.

RW1 said the applicant was supposed to return the remaining six candles to Mandla Dlamini for safe keeping.

RW2, Mandla Dlamini told the court that the applicant admitted the theft and apologized to management. RW2 said the applicant was supposed to return the remaining six candles to him. He denied that there was an arrangement between him and the applicant not to return the candles.

RW3, Bernard Abramovitz told the court that he was one of the directors of the company and that he was present during the disciplinary hearing of the applicant. He said the applicant confessed and asked for leniency.

The Respondent's case therefore was that the applicant was fairly dismissed in terms of the Employment Act No.5 of 1980 on account of the theft of the six church candles.

During the submissions the applicant's attorney urged the court to find that there was a discrepancy between RW1 and RW2's evidence relating to what transpired during the

disciplinary hearing. She said the discrepancy was material to the case of the applicant as it was the applicant's argument that no hearing was held before she was dismissed.

It was also argued that there was discrepancy between RW1 and RW2's evidence as to whether Anne Leibrandt did ask or say anything during the hearing.

The court however, is unable to agree with the applicant's attorney's submissions that the court should find that no hearing was held before the applicant was dismissed.

In her opening statement the applicant's attorney told the court that the applicant's case was that the dismissal was unfair because the applicant was not given an opportunity to state her case during the hearing and not that there was no hearing.

It was also not put to the respondent's witnesses that no hearing was held before the applicant was dismissed.

Furthermore, during the cross examination of the applicant, she said she did get the opportunity to deny the allegations, but she wanted to be represented by one of the workers.

There is no doubt to the court that a hearing was held, but was clearly not satisfactorily conducted as the applicant was not given opportunity to prepare for the case and was also not advised of her right to be represented if she wanted to.

It was also argued on behalf of the applicant that there was contradiction as to what were the candles wrapped with. It was argued that such contradiction casts a doubt whether the theft occurred or not.

The contradiction or discrepancy was in regard to name given to the piece of cloth that was used to wrap the six church candles. Some of the witnesses referred to it as an apron and others referred to it as a traditional cloth or "umhelwane".

Whatever name was given to that piece of cloth, the applicant did not deny however that it was the piece of cloth that she used to protect herself with when doing her work.

Furthermore, the applicant did not deny that the six church candles were the remaining six candles that she had been working on. The identity of the church candles was therefore not in dispute.

The applicant said she had agreed with RW2 that she was not to return the remaining candles. RW2 however denied that there was such an agreement. RW2's evidence that the applicant was supposed to return the six candles to him was not challenged during cross-examination.

The court will therefore accept RW2's evidence that it was the procedure that the remaining candles were to be returned to him for safe keeping at the end of the day.

The court will accept the applicant's evidence that nothing was found in her bag on being searched by RW1. This is more so because the court is of the view it was highly unlikely that the applicant would put the six candles in her bag when she knew that the security guard was going to conduct a search.

Furthermore, the minutes reflect that the evidence led at the hearing was that the candles were wrapped in an apron and put in a plastic packet.

From the evidence before it the court will make the following findings;

First, that the applicant was on 13/03/2002 given twenty-four church candles to work on. She finished eighteen and six remained.

Second, she did not return the remaining candles to the production manager, RW2.

Third, the six candles were later on that same day recovered by the security guard RW1, outside the fence of the respondent's premises and wrapped with the applicant's apron or protective cloth and put inside a plastic bag.

Fourth, no proper disciplinary hearing was held as the applicant was not served with a written notice of the hearing. She was also not given sufficient time to prepare for the hearing and was not advised of her right to representation and appeal.

Fifth, the candles were contained in a plastic bag and were not found in the applicant's handbag.

Sixth, that the applicant admitted the theft to management.

Besides the evidence of the admission by the applicant, the court would still have come to the conclusion that the applicant committed the crime of theft. This is because the respondent needed only to prove the commission of the offence on a balance of probabilities - that is, the inference that the applicant committed the conduct alleged must be more likely than that she did not. **(SEE JOHN GROGAN "WORK PLACE LAW" (2001) 6th EDITION AT PAGE 138).**

In this case it was proved that the six candles were the remainder of the twenty-four candles that had been given to the applicant to work on. It was proved that the apron that was used to wrap the candles belonged to the applicant. It was proved that she was supposed to return them to the production manager, but she did not do that.

The court will therefore come to the conclusion that the respondent has proved on a balance of probabilities that it dismissed the applicant for an offence permitted by Section 36(b) of the Employment Act in that she had committed a dishonest act against her employer.

The respondent has therefore discharged the onus resting on it in terms of Section 42(2)(a) of the Employment Act.

The court has already pointed out, and it was clear from the evidence that there was no procedural fairness during the disciplinary hearing. In the Industrial court of Appeal case of the

Central Bank of Swaziland V Memory Matiwane, case No.110/1993 on page 3 Sapire JP, held as follows:-

"The provisions of the act require the Industrial Court to take into account all the circumstances of the case in deciding whether there has been an unfair dismissal in the first place and secondly where such unfair dismissal arises from a defect in the procedures, the court is obliged to enquire whether in all the circumstances of the case are such that the employee is entitled to compensation at all and if so in what amount...." (my emphasis).

In the present case the only unfairness of the dismissal arises from the defect in the procedures. The court must now enquire whether in the light of all the circumstances of the case, the applicant is entitled to any compensation at all and if so in what amount.

The applicant committed a dishonest act against her employer, her very source of livelihood. She breached the relationship of trust between herself and the employer. The employer was at that time undergoing financial difficulties and the employees were aware of that. The respondent's sole activity was candle making and for any employee to steal any one piece of candle was financially detrimental to it.

There was evidence that the respondent treated its workers as family.

From the foregoing it seems to the court that though the dismissal was procedurally defective, this is not a case where the court should make an order for compensation at all.

Furthermore, at common law the respondent could justifiably summarily dismiss the applicant as she committed a dishonest act.

The respondent has therefore satisfied the requirements of section 42(2)(b) of the Employment Act, namely that taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant.

The application is therefore dismissed. No order for cost is made. The members agree.

N. NKONYANE

ACTING JUDGE- INDUSTRIAL COURT