

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 187/2001

In the matter between:

RONALD GULE

APPLICANT

and

FIDELITY SPRINGBOK SECURITY SERVICES (PTY) LTD

RESPONDENT

CORAM:

RESPONDENT

NDERINDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : B. ZWANE

FOR RESPONDENT : N. 1 HLOPHE

J U D G E M E N T - 21/06/05

This is an application for the determination of unresolved dispute in terms of Section 85 (1) of the Industrial Relations Act No. 1 of 2000 (hereinafter the Act). The Applicant claims maximum compensation for unfair dismissal in terms of Section 16 (6) of the Act. Other claims include one month's salary in lieu of notice, and arrear salary for January 2001 in the sum of E557.00.

The Applicant alleged that he was employed by the Respondent on 20th March 2000 as a supervisor of security personnel. He was promoted to the position of site manager in the year 2000. He was based at the Swaziland United Bakeries premises at Matsapha.

His duties included supervision of guards on duty, doing random checks on trucks, patrols in the premises, random checks on bread requisitions and loading and other relevant paper work at the gates after every shift.

On the 25th January 2001 he reported for night shift at 1800 hrs.

At 1.30 hours on the 26th, he got a telephone call from a security guard in Nhlanguano by the name of Nxumalo. He told him that the truck from Matsapha had an over load of bread.

He commenced investigations straight away. He contacted the night shift dispatch clerk at the Matsapha premises by the name of Ernest Msibi and the security guard on duty during the loading by the name of Joseph Magagula.

The two were supervising the loading of the bread into the Nhlanguano truck that evening. His investigations revealed that the truck was loaded with 3,790 loaves of brown bread, and 2,290 loaves of white bread totaling to 6,080 loaves of bread.

During the morning shift, the truck had been loaded with 5,510 loaves of brown bread. This was done by the day shift dispatch clerk by the name of John Thwala and the guard who was on duty at the time was Guard No. 452; who he could not recall his name.

The night shift clerk Earnest Msibi informed him that he forgot to tally the day load of 5,510 loaves on to the Invoice No. 3339. As a result, the documentation did not reflect the correct order made by the Nhlanguano depot for the day which was 6,080 loaves and 5,510 loaves totaling to 11,590 loaves.

According to the Applicant, the truck had no overload. All that was needed was to correct the invoice by including the 5,510 loaves that had been loaded in the morning by different officers.

On the 26th January 2001, the Applicant reported for duty at 18 00 hrs for night shift. At the time he had already concluded the investigations and corrected the anomaly.

At 1900 hrs, the Applicant received a call from his Manager one Bheki Magagula informing him that he was under suspension due to the previous night's overload of bread. He was advised to make a report as to his whereabouts on the night of 25th January 2001.

He made a report as requested and sent it to the head office. He was then asked to report on the 31st January 2001 for a disciplinary hearing.

On the 31st January 2001 one William Dlamini was chairing the disciplinary hearing. He received the charge on the same day which included, negligence, poor work performance, lack of punctuality and desertion. The matter was postponed to the 1st February 2001.

On the 2nd January 2001 he received a monthly salary of E1,242.77 (One Thousand Two Hundred and Forty Two Emalangeni Seventy Seven Cents) instead of the usual E1,800 (One Thousand Eight Hundred Emalangeni). He was informed that the difference of E557.00 was withheld pending the disciplinary hearing.

It was alleged at the hearing that the overload that occurred on the evening of the 25th January 2001 was a result of his failure to supervise the loading of the Nhlangu truck. That indeed, he had deserted work that evening and never came back until the early hours of the morning after the incident was reported.

The Applicant denied that he was not on duty on the material night. He denied there was an overload but instead there was a clerical omission by the dispatch Clerk by the name of Msibi. He added that his duties included random checks at

various places at the SUB premises during patrol and supervising guards and was not expected to be at the loading bay all the time.

He was found guilty of all the charges leveled against him and was summarily dismissed on the 7th February 2001 by Mr. Dlamini.

He was aggrieved by the dismissal. He reported a dispute to the Conciliation Mediation and Arbitration Commission via the office of the Commissioner of Labour.

The dispute was not resolved and a certificate of unresolved dispute was issued.

The Applicant was employed by the University of Swaziland at the Luyengo Campus on the 10th June 2003 as a senior Security Officer. He earned E5,700.00 (Five Thousand Seven Hundred Emalangeni) per month. He was married with

six children. He suffered hardship and financial loss during the time of his unemployment.

He claims that the dismissal was not for a reason permitted by the Employment Act No. 5 of 1980. And that the same was both procedurally and substantively unfair.

RESPONDENT'S CASE

The Respondent alleges that whereas at the time the Nhlangu truck was being loaded the Applicant was on duty, he failed to supervise the loading nor did he counter check the counting of the loaves as he was supposed to do. This was the first charge. The second charge related to allegation that he deserted his station after the loading of the truck and returned at 4. a.m. in the morning.

The allegations were denied by the Applicant.

Mxolisi Ndlangamandla testified as RW1 for the Respondent. He worked for the Respondent as a Guard Supervisor at the SUB Nhlangano depot. On the night of 26th January 2001, he received a truck from SUB Matsapha. From the documentation, he expected 6080 loaves of bread, he found out that the truck had 11,090 loaves i.e. 5,510 loaves in excess.

As the security officer responsible he had opened the truck together with the Dispatch Clerk Sebenzile Khumalo.

He called Matsapha twice but Mr. Gule could not be located. There was a 30 minutes interval between the calls.

He then called Mr. Joseph Magagula to alert him of the problem.

He denied that 11,090 loaves were expected insisting that only 6,080 loaves were expected. He kept the extra loaves of bread (5,510 at the dispatch) and then reduced the order for the following day.

RW2 was Mciniseli Gamedze. He worked at Matsapha SUB. He was trained by the Applicant on the job at Matsapha. He was on the same job rank as the Applicant had been brought to Matsapha SUB to replace the Applicant.

He told the court that he was a supervisor of guards. The guards supervised the loading of the trucks to ensure correct quantities were loaded. Mr. Gule was supposed to double check that the loading had been done correctly. Mr. Gule trained him to do that. This was particularly done for the long haul trucks to Nhlangano and Siteki.

He worked on shift basis and if he was not there somebody else would do the double checking. A standby was arranged for the shift when he was not on duty. He concentrated on the two trucks to avoid theft. He however patrolled the whole SUB

compound. The physical count was done by the security guard on duty and the order was prepared by SUB personnel.

RW3 was Joseph Sikelela Magagula. He is the security guard who supervised the loading of the truck on the material day. He received a call from Nhlango. They wanted Mr. Gule. He tried to locate him in vain. He only saw him at around 4. a.m. in the morning. They looked for him all over the premises.

His work was to physically count the bread loaded. He then sealed the truck. On the day in question he counted the bread and sealed the truck. When he reported for duty he found the loading of the truck to Nhlango taking place.

He replaced one Zikalala at 6 p.m. Ernest Msibi was the Dispatch Clerk for the night shift. He was responsible for receiving the order and preparing the invoice.

He told the court that he saw the order form and the invoice for the day and the total bread they were supposed to load for the day was plus or minus 9,000 loaves.

During the handover between the shifts, they got information of the bread already loaded from the previous security guard and the Dispatch Clerk.

After the call from Nhlango, Ernest Msibi added the figure of 5,510 loaves of bread on the invoice to eliminate the disparity between the bread loaded and the figure on the invoice. He was subjected to a disciplinary hearing and fined E108.00 (One Hundred and Eight Emalangi). He was charged for loss of bread. He did not know what bread was lost.

He said loading at times proceeded in the absence of Mr. Gule. He needed not be there at all times.

On this day the truck was half loaded when they reported for work at 6 o'clock. They signed the invoice trusting the figures they got from the previous shift.

He said he did not recall making a statement to the effect that he forgot to record the correct load of bread. This was clearly seen in his written statement however. He said that the omission to include the 5,510 loaves of bread on the invoice was his. He did not tell the disciplinary hearing that to avoid punishment.

Several issues stand out upon a careful analysis of the evidence before us. Firstly, the Applicant being a Site Manager had security responsibility over the entire premises of SUB Matsapha.

That he worked a twelve hour shift and a replacement would be arranged in his absence.

That at the time of his dismissal he had been assigned to train his replacement.

That the loading of the Nhlanguano and Siteki trucks was always under supervision of a Dispatch Clerk employed by SUB and a Security guard employed by the Respondent. The two were responsible of ensuring that the correct number of loaves were loaded and that the invoices reflected the correct number of loaves loaded.

That the site manager patrolled the compound and did regular random checks on the subordinates at the gate and other points in the premises including the one overseeing the loading of the truck.

On the material day the Applicant reported on duty for the night shift and did his work as normal.

That the truck to Nhlanguano was halfway loaded by the day shift and filled up by the night shift. That the night dispatch clerk and the security guard took over from the morning team. The two however omitted to include the bread loaded during the day shift in the final invoice that accompanied the truck.

This was the problem that the Respondent blamed on the Applicant and found him guilty of leading to his dismissal.

In addition, it was alleged that he was not at the site during certain hours in the night when the security guard by the name of Joseph Magagula looked for him to receive a telephone call from Nhlango.

The Applicant told the court that he was present at all times on the night of the 25th January 2001. That he attended to the problem of the invoice error as soon as it was drawn to his attention. That this was not a case of over loading because the correct order of bread by Nhlango was 11090.

The Respondent's witnesses on the other hand gave contradictory testimony on the actual order of bread to the Nhlango depot on the material day.

RW1, Mxolisi Ndlamandla who was based at Nhlango told the court that they expected 6080 loaves of bread at Nhlango but received 11,090. The documentation showed 6080 however.

RW3 Joseph Sikelela Magagula on the other hand told the court that he had seen the order for Nhlango whilst himself and Ernest Msibi supervised the loading of the truck. He said that the total order for Nhlango was plus or minus 9,000 loaves of bread.

It is clear that the Respondent witnesses were not sure of the correct order of bread expected at Nhlango. The Applicant was very clear that 11,090 loaves of bread were expected. That of that order, 5,510 loaves had been loaded in the morning.

The only mistake was the omission by Mr. Msibi, the SUB dispatch clerk to record the morning load. Mr. Gule told the court that he rectified the error timeously as soon as it was drawn to his attention.

The Respondent has failed to show on a balance of probabilities that Mr. Gule was negligent in his duty on the material day.

Even if he had been, he had no previous warning for poor work performance and therefore in terms of Section 36 (a) of the Employment Act, he could only be dismissed for the offence after a previous written warning. This was not the case.

The offence of desertion was clearly not proven on a balance of probabilities. The Applicant reported to work, and no evidence of him leaving through the gate was given to the court. The gate was manned by a security officer the whole night and the said guard was not called to narrate when and how Mr. Gule had left the SUB premises.

There was also no evidence of how he allegedly came back at 4 a.m. in the morning.

The Respondent has failed to prove therefore that it dismissed the Applicant for an offence permitted by Section 36 of the Employment Act in terms of Section 42 (2) (a).

Furthermore, the Respondent has not shown that it was fair and reasonable to dismiss the Applicant as per the requirement of Section 42 (2) (b) of the same Act.

The Application succeeds on the merits.

COMPENSATION

The Applicant was unfairly dismissed contrary to the Employment Act. He suffered joblessness upon dismissal. His family lost financial support during the time he was unemployed. The Applicant however acquired a better paying Job soon thereafter. He had served the Respondent for a period of about one year at the time of his dismissal. He was not given notice upon dismissal nor was he paid in lieu of notice.

His January 2001 salary was unfairly reduced by E557.00 (Five Hundred and Fifty Seven Emalangeni)

Accordingly the Respondent is to pay a sum of E1,800.00 (One Thousand Eight Hundred Emalangeni) in lieu of notice; E557.00 (Five Hundred and Fifty Seven Emalangeni) being the balance of the January 2001 salary.

The Applicant is also to receive six months salary as compensation for the unfair dismissal in the sum of E10,800 (Ten Thousand Eight Hundred Emalangeni. Total payment equals E13,157.00 (Thirteen Thousand One Hundred and Fifty Seven Emalangeni).

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT