

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 214/2002

In the matter between:

SIBONGISENI SIMELANE APPLICANT

And

SWAZILAND RAILWAY RESPONDENT

CORAM:

NDERI NDUMA PRESIDENT

JOSIAH YENDE:MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. SIMELANE

FOR RESPONDENT: Z. JELE

JUDGEMENT- 15/02/05

The Applicant was driving a train from Lavumisa to Matsapha. He was due to go via Nsoko Railway Station en-route to Maloma siding to unload empty carriages. Upon arrival at Nsoko he requested permission to shunt.

The discussion between the Applicant (Sibongiseni) and the Train Controller (Meshack) is well documented in the transcript and went on as follows:

"Sibongiseni: May I ask for permission to shunt on section Nsoko Bigbend.

Meshack:

Right you may shunt, you may shunt and the key is there at Nsoko.

Time recorded at this moment is 08.46.

At 09.21

Meshack: Calling Sibongiseni, Sibongiseni - Sibongiseni come in for Mpaka.

Sibongiseni speaking.

Meshack:Are you not finished running around the load?

Sibongiseni:I am shunting - still in the section (cut radio).

Meshack:Come on again I cant hear you "over".

Sibongiseni: I asked for permission to shunt in the section 'over' you don't want me to go - (radio cutting again)..... I want to go to the siding also.

Sibongiseni: Meshack, Meshack, come in for Sibongiseni.

Meshack: Yes Sibongiseni.

Sibongiseni: I said I wanted the Section to go to the siding to park the trucks only..... break.

At 9:27

Andreas: Driver of Train 2800 at BigBend: (to the TCO) - Meshack

you said I will cross train 2709 here at BigBend.

Meshack: (To Andreas) just be on standby, just be standby I

don't know really what is going on there with Sibongiseni. He asked for permission to shunt his load, I really wonder what takes him so long. Just to change the locomotives to the rear. I don't know what is going on here".

This is part of the verbatim conversation between the Applicant and the TrainController Meshack Magagula capturing the specific circumstances that led to the dismissal of the Applicant.

The brief facts captured in the dramatized form are that the Applicant whilst driving Train No. 2709 entered the Nsoko - BigBend Section and traveled as far as Maloma siding and returned to Nsoko without a written train proceeding authority. This action occurred on the 7th October 1999.

Subsequently on the 11th October 1999, the Applicant and his train assistant Samuel Bhembe were both suspended from duty by Mr. V. T. Mamba the Assistant Director and an inquiry was commissioned by the Chief Train Controller Mr. C. J. Dlamini into the circumstances of the case.

Following the Inquiry, a disciplinary hearing against the Applicant was directed by Mr. S. Z. Ngubane Director Traffic on the 7th December 1999.

The Applicant was charged with the offence of contravening "RTOS Regulations 2.3, 29.1 and 29.2 and the TWR 2 and 16."

The Applicant was requested to respond to the charge in writing which he did in a letter dated 13th December 1999.

Subsequently, a notice to hold a full disciplinary hearing against the Applicant on the charges aforesaid was issued on the 7th February 2002 by the Chief Executive Officer (C.E.O.) Railways.

The charge remained the same but was framed as follows:

"Notice is hereby given that a disciplinary hearing will be held to establish the guilt or innocence of Mr. Sibongiseni Simelane PF 2044 who was the driver of train 2709 operated to/from Maloma siding on the 7th October 1999 in contravention of TWR 2 and 16 and RTOS Regulation 2.3, 29.2 and 29.2".

From the record of the proceedings it was stated that the purpose of the disciplinary hearing was to establish:

1. What the TWR General Appendix and RTOS Regulations stipulate regarding the working of Maloma siding and what the procedure is to occupy a section under RTOS Instruction.
2. What authority the driver of Train No. 2709 had to occupy the section and for what purpose.
3. Whether the train assistant knew what authority the driver had and for what purpose.
4. Whether the unauthorized movement posed an imminent danger to other trains that were to occupy or had occupied the section.
5. What trains working rules and regulations were violated by the train driver.
6. Whether radio communication was clear at the time of message exchange.
7. What was recorded when the exchange of messages took place.

The disciplinary hearing was chaired by one Mr. H. P Loubser with Messrs Victor IMGwenya and Musa Mkhonta as members. Ms. Joyce Zwane was the Secretary and there was an observer from the union.

Witnesses called to the hearing including Mr. Meshack Magagula, the Train Control Officer (TCO) responsible at the time of the occurrence, Mr. Samuel Bhembe, the train assistant to the Applicant, Mr. Mkhawuleni D. Nhleko, the Loco Inspector/Rules Instructor, Mr. Lucky S. Dlamini the Chief Train Controller and Mr. Kenneth Nkarnbule, a Loco Inspector.

The hearing commenced on the 16th February 2000.

Recorded statements of all the witnesses were availed to the court as part of the disciplinary proceedings.

The disciplinary tribunal after the deliberations found the following: •

1. The Board came to the conclusion that the train driver Mr. Sibongiseni Simelane PF 2044 was guilty of contravening the following:

1.1 RTOS 5.8- completion of train orders

1.2 RTOS 29.1/29.2 Shunting at Maloma siding

1.3 RTOS 2.3- driver's authority to enter section.

1.4 RTOS 2 - safety

1.5 TWR 16 - Obedience to regulations and instructions.

The court heard the evidence of the Applicant first in this matter as is the practice of the Industrial Court. This is inspite that the burden proper of proving that the Applicant was dismissed lawfully, fairly and for a reason permitted by Section 36 of the Employment Act No. 5 of 1980, rests on the Respondent in terms of Section 42 (2) (a) and (b) of the Act.

All that the Applicant was required to show is that he was an employee protected by Section 35 (2) of the Act. The Section provides that no employer shall dismiss an employee unlawfully. Section 35 (1) on the other hand lists categories of employees who are not protected under Part V of the Act.

The Applicant told the court that he was employed by the Respondent on the 7th February 1991 as an assistant train driver and was in continuous employ of the Respondent until the 7th April 2000. He had

worked for the Respondent for more than nine (9) years. He was thus not excluded from protection in terms of Section 35 (1) of the Act.

Being a protected employee, therefore, in terms of Section 35(2) the Respondent could only dismiss him for a reason provided under Section 36 and upon concluding that it was fair to dismiss him taking all the circumstances of the case into account.

Lengthy testimony was adduced and a plethora of documentation was produced by the parties in this matter.

Though the facts appear complex to a person not directly involved in the Railway transport industry, the pith of the matter boiled down to the following simple facts:

1. It was common cause that the Applicant on the 7 October 1999 drove train 2709 from Nsoko train station to Maloma siding and back to Nsoko.
2. It is also common cause that the Applicant did not obtain written authority from the Train Controlling Officer (TCO) on duty before embarking on the trip to Maloma and back.
3. It was common cause that operation of trains was governed by Swaziland Railway, control of transport by means of the Radio Train Order System contained in Circular No. 1 issued on the 1st September 1991 by the Chief Executive Officer.
4. In particular Regulations 29.1 and 29.2 governed operations of a train to and from Maloma siding. The two state as follows:

"29.1 An order must be issued to the driver to proceed to Maloma siding. Upon arrival in the siding train order must be cancelled "trip completed". Driver must assure TCO that siding switch points are set and locked for the main line.

29.2 Driver must not re-enter the main line between Nsoko and BigBend without a completed train order and authority of the TCO".

It is indisputable that the Applicant completely ignored regulations 29.1 and 29.2.

Instead he informed the TCO that he wanted to shunt at Nsoko and thereafter proceeded to Maloma siding. He received verbal authority over the radio to shunt at Nsoko which he proceeded to do. He told the court that he interpreted this authority to shunt at Nsoko to have included authority to move to the Maloma siding because the TCO informed him that he could take the key to the siding at Nsoko. The Applicant presented himself as a well educated driver. Infact he told the court that he believed that his superiors victimized him because he was better educated than they were.

It was clear to the court that he was well versed with train operations and the regulations governing the same. He was undoubtedly familiar with the regulations governing shunting at Maloma siding.

The Applicant told the court however that the practice of operating the trains was different from the theory contained in the regulations. That he had on several occasions been authorized by the TCO to enter Maloma siding without a written authority and to re-enter the main line without canceling the

train order "trip completed". This was the reason why he thought the TCO had verbally allowed him to shunt at Nsoko and proceeded to Maloma.

He told the court that since the TCO was aware how he had' operated in the past, there was no danger that he would have allowed another train to enter the section.

He added that if the TCO had not authorized him to proceed to Maloma verbally, then the manner in which he had spoken substantially misled him to believe he had authority to proceed.

The Applicant downplayed the entire episode stating that there was no accident averted as the respondent would want the court to believe. That indeed his suspension was an after thought because one Kenneth Nkambule, a Loco Inspector had considered the matter and lifted the suspension that had been imposed on him immediately after the incident.

He was aggrieved by the dismissal stating that it was harsh and inconsiderate of his past record. He decried the procedure applied to discipline him stating that he was dismissed by the C.E.O. yet he was supposed to appeal to him.

That upon dismissal he delayed to file an appeal because he had received the disciplinary report without excerpts of the individual witnesses. He was told to appeal to the chairman of the Board and when he did he was informed that the appeal was time barred. He believed that he had lodged the appeal timeously and in any event within the prescribed 14 days.

The Applicant reported the dispute to the Commissioner of Labour who transmitted the same to the Conciliation Mediation and Arbitration Commission (C.M.A.C). They were unable to resolve the dispute, hence the application to court.

The Applicant told the court that he was currently running a family business and would not like to return to the Respondent's employ.

At the time of dismissal, he earned Four Thousand and Fifty Six Emalangen (E4,056.00.) per month. He was thirty four years old and had three children to take care of.

He sought compensation for the unfair dismissal because he has suffered financial loss, as a result thereof. He believes that he was set up by the TCO Meshack Magagula due to jealousy.

The Respondent in a bid to discharge its statutory onus placed on it by section 42 (2) (a) and (b) called several witnesses, the first of whom was Vincent Fana Mamba who worked as Assistant Director Train Operations. His work was mainly to manage locomotive wagons, human resource and general operations. He told the court that movement of trains was regulated by the Train Control officer stationed at Mpaka control office through radio communication.

That the drivers like the Applicant underwent training by the respondent on train working regulations manual. This was the sole working document by the Respondent.

He described shunting as the movement of a locomotive or motor powered vehicle with or without wagons attached within prescribed limits.

In contrast, train movement in a section was preceded by a request of authority by a driver to a train control officer. The authority if granted was reduced in writing and read over by both parties to each other and confirmed as correct.

The rationale for the procedure is to ensure complete control of train movement by the train control officers. He had to know the position of all trains at any given time to avoid accident. The train working regulations (TWRs) according to the witness were strictly applied at all times. He disputed the allegation by the Applicant that the regulations were hardly applied in practice.

Shunting within the limits of a Railway Station did not require any written authority. But movement of a train into a section beyond the station limit always needed a written authority. He denied that there were stations without boards marking outermost points to which shunting within station may be done without a train order. In any event, at the station there were shunters to help in train movement and turning.

He emphasized that in the case of Maloma, the siding was four (4) kilometers from Nsoko station and this was way beyond the shunting limit and written authority was required therefore.

He said that if the train drivers and TCOs ignored the train working regulations that would lead to severe consequences unless previous transgressions alluded to by the Applicant never reached the attention of management.

He further explained that the situation as in this case is regarded as an averted collision because the Railway operated on the principle of absolute working

He explained that a key was required to enter and move out of Maloma siding and that the same was found either at Nsoko or at Maloma. The drivers would be told where to find the key.

The witness said the Applicant committed a very serious offence similar to entering a red signal area, and the consequences for such transgression was a dismissal.

He further explained that the Applicant's case could not be helped by TCO's evidence that he could not have issued another order into the section without knowing the whereabouts of the Applicant. The fact remained that the Applicant had no authority to enter the section and he did. For sometime, the TCO was not aware of his whereabouts as is evident from the radio communication.

Further, he explained that round trip orders are issued in areas prone to communication problems. The Applicant's case was not such a case. He simply failed to obtain a train order before leaving Nsoko for Maloma.

The witness however told the court that considering the circumstances of the case if he were the one chairing the disciplinary hearing, he would have found the Applicant guilty as charged but would have given him a lesser sentence than dismissal. He suggested that the Applicant should have been demoted or deployed to other duties.

He added however that each case was judged on its own merits and that may explain why drivers who had been charged for similar transgressions in the past received warnings.

The Applicant had two previous warnings relating to his conduct as a driver.

Witness number two (RW2) for the Respondent was one Stephen Ngubane, the Director of Operations and Marketing. Up to the year 2000, he was the director of traffic and was in that capacity the overall manager of marketing and human resources. He is the officer that wrote the letter that terminated the services of the Applicant.

Speaking on the Applicant's previous record at work, he said that on the 31st October 1997 a train derailed whilst driven by the Applicant. He had fallen asleep whilst driving, he received a warning after the accident.

On the 24th May 1999 the Applicant had a side collision whilst driving a train. He was suspended and the said suspension was lifted without an inquiry.

Each case clearly depended on the circumstances.

In the present case following the transgression, the Applicant was suspended on the 8th October 1999.

He challenged the suspension stating that the issue was minor. According to the witness, management viewed the incident in very serious light. Going to a section without a written authority was a recipe for a major collision. One can't operate trains without rules, and if a train driver was given to disregard them, then he had no place to serve as driver. He stated that the Applicant was dismissed fairly in the circumstances of the case after a full inquiry followed by a disciplinary hearing.

The most basic rule of train operations was that if a train was in a given section no other train could enter the same. This is referred to as 'absolute working' and drivers were well versed with the basic rule.

The level of responsibility expected of the train drivers and TCOS in train operations is very high. If it then was anything less than that, it was unfortunate and the culprits must face the consequences as and when detected.

The witness would not rule out that similar cases were treated differently by management in the past. He emphasized that every case had its own set of facts, and was treated on its own merits. This was no excuse for any officer to disregard laid down regulations deliberately.

He said that the Applicant did not demonstrate an iota of remorsefulness but rather was insistent that the offence was minor. This meant that he could not be reformed, hence the ultimate sentence.

This is also the attitude demonstrated by the Applicant in court. The Applicant clearly insinuated that

officers such as the witness who were not directly involved in train driving had no business to tell them what to do. That the reality of train driving was very different from the theory contained in the manual and that deviation from the manual was common place. The court accepts the view of RW2 that this is a very dangerous disposition by the Applicant especially in the industry he worked.

RW3 was the Train Control Officer (TCO) Meshack Magagula who was on duty on the material day. He was categorical in his testimony that he had never allowed the Applicant in the past, or on the day in question to move to Maloma siding without a train order. He emphasized that he had expected Applicant to radio him upon completing shunting at Nsoko, which he did not.

He said that the radio communication recorded verbatim was self explanatory that he did not authorize movement to Maloma and that his mention of the key was merely to alert the Applicant where to collect the same upon completing the shunting at Nsoko.

He added that he was surprised when the Applicant appeared to take such a long time at Nsoko hence his attempt to find his whereabouts.

It was clear from his testimony he could not have allowed train No. 2800 to enter the section before he knew the exact location of the Applicant. This however did not mean that there was no violation of the regulations[^]by the Applicant.

The court was referred by the Respondent to the case of National Union of Mine Workers and Mpukani

v Doorfontein Gold Mining (1994) 5 (7) SA LLR 18;

Where it was held that disregard by an employee of safety rules and precautions that puts the safety of the operation and that of workers in jeopardy, is such a serious offence that even a single disregard thereof might warrant dismissal.

The court has considered the evidence of the Applicant in its entirety vis avis that of Meshack Magagula and in particular the explanation that he was misled by the TCO'S Radio communication on the material day; that it was common practice for him to shunt at Maloma without a train order; that there was zero possibility of an accident occurring because the TCO was aware of his whereabouts and that this may have been a set-up by the TCO due to jealousy.

This we have weighed against the nature and seriousness of the offence committed in the light of possible consequences to life and property if such laxity in following regulations continued to be condoned.

The court is of the considered view that the Respondent has discharged its onus in terms of Section 42 (2) (a) that the Applicant was dismissed for an offence permitted by Section 36 (d) of the Act in that either by imprudence or carelessness, he had endangered the safety of the undertaking and that of other persons employed or resident at the undertaking.

The horror, loss of property and lives experienced whenever there is a train accident cannot be over

emphasized.

The application fails.

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT