IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 199/04

In the matter between:

VEL1S1WE MANANA **APPLICANT**

And

SWAZILAND NATIONAL TRUST COMMISSION **RESPONDENT**

CORAM

NKOSINATHINKONYANE: ACTING JUDGE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR THE APPLICANT
MBUSO E. SMELANE: MBUSO E. SMELANE & ASSOCIATES

FOR THE RESPONDENT
PETER DUNSELTH: DUNSEITH ATTORNEYS

J U D G E M E N T 17.01.06

The applicant is a former employee of the respondent. She was employed as a reservation officer based at Mantenga Nature Reserve on a permanent basis.

She brought this application to court wherein she claimed that she was constructively dismissed by the respondent. She resigned from the respondent's employ on 31st August 2002 by letter dated 23rd August 2002.

In support of her claim, she stated the following in paragraphs 10-13 of the particulars of claims.

> "10. The applicant successfully challenged the suspension and transfer. A copy of the judgement is attached hereto marked ' VM2'.
>
> 11. The applicant armed with the judgement went back to her former position/job

but was again suspended by the Chief Executive Officer without a hearing nor following the rule of natural justice.

12. The Chief Executive Officer who had no powers to suspend the applicant advised the applicant to forget about being employed at respondent's premises in the future.

13. The applicant thereafter resigned from her employment due to the frustration exhibited by the Chief Executive Officer which was a breach of trust and confidence".

The respondent's defence to the claim was that the applicant was not constructively dismissed but resigned on her own accord without any reasonable grounds.

Two witnesses testified before the court and a number of documents were handed in support of the oral evidence.

The evidence revealed that the applicant was suspended from work by the late Mr. Michael M. Fakudze in July 2002. The reasons for the suspension as appear in the letter marked "VM1" were:-

"... lack of respect to the C.E.O. and lack of interest to your work given by your Marketing Sale Manager on the July 8-2002..."

The applicant was on the following day transferred to the National Museum to take up the post of Assistant Librarian (Trainee). The applicant instituted legal proceedings by way of urgent applicant challenging the transfer. She was successful and the transfer was accordingly set aside by the court.

The applicant then reported to work. She told the court that on arrival she was not well received by management and was on that same day in the afternoon given a letter of suspension "VM3". She went home and after consideration she wrote a letter of resignation on the basis of constructive dismissal taking into account the conduct of the respondent towards her. The evidence by RW1 however showed that she had been to work for more than one day when she was served with the letter of suspension.

RW1, Rosemary Andrade testified on behalf of the respondent. She told the court that

she is the Director of the National Museum. She told the court that the late Fakudze reported to her the problems involving the applicant. She said the applicant was a good employee until the period that she was given work to do and she failed to do it. RW1 also told the court that the applicant was transferred in order to avoid the taking of disciplinary action against her. She said she got to know about the court order on the day of the judgement on 13th August 2002.

RWl's evidence was not very helpful to the court. At the time that the issues leading to the resignation of the applicant arose she was not based at Mantenga Cultural Village. She correctly told the court that she got a report from the late Michael Fakudze about what was taking place at the Cultural Village.

The applicant's case is that she resigned as the result of the conduct of the respondent towards her. She therefore bears the burden of proof to show that the conduct of the respondent was such that she could no longer reasonably be expected to continue in her employment. Her case is predicated on the provisions of Section 37 of the Employment Act No. 5 of 1980. That section provides that:'

> *"When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice then the services of the employee shall be deemed to have been unfairly terminated by is employer."*

In assessing the evidence before it to find out if there was, or there was no constructive dismissal, the conduct of the parties must be looked at as a whole. The court must also assess the cumulative impact or effect of such conduct.

Furthermore the employer's conduct must be such that it was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

The evidence led before the court revealed that at Mantenga Cultural Village there is a restaurant whose Marketing and Sales Manager is a certain Brian Lunderstedt. The restaurant lost business at one point when a group of tourists called Uitkyk was supposed to spend the night at Mantenga Cultural Village, but was eventually booked at Malolotja Nature Reserve. Naturally, the restaurant complained because it lost business.

A meeting was held to address the issue of improving the booking system and finance

collection. The Applicant, Fakudze and Brian were tasked to produce new forms. The design of the forms was to include information from other departments. The Applicant said that the first instruction to produce the forms came from Brian. This was denied on behalf of the respondent. The court will however believe the applicant's version as it was supported by the letter of her suspension "VM1". In that letter Michael Fakudze wrote as follows and I quote verbatim:-

"Due to your lack of respect to the C.E.O. and lack of interest to your work given by your Marketing Sale(sic) Manager on the July 8-2002, you are now suspended to your work as Booking Officer at Mantenga Gate House, until further notice ".

The evidence further showed that the applicant was frustrated by this arrangement wherein she was expected to take instructions from Brian who was not an employee of the Respondent. It was clear to the court that Brian was given free reign by the respondent. It cannot therefore be said that she was unreasonable when she said she felt frustrated.

The evidence further showed that soon after she returned to work she was suspended. In the letter of suspension "VM3" there were additional charges. The applicant was served with the letter of suspension on the 19th August 2002. There was a dispute as to whether that was the date that she returned to work. The applicant said that she was served with the suspension letter on the first day of her return.

From the evidence of RW1 however, it transpired that the suspension letter was not served on her on the first day of her return to work. If the applicant returned to work on the date the judgement was delivered in court on the 13th August 2002, it means that it was seven days since she returned to work when she was served with the suspension letter on the 19th August 2002.

Whether the applicant was served with the suspension letter on the first day of her return or five days later is not important. What is important to the court is that she was not well received on her return. She was served with the letter on the first occasion that she had to meet someone in management. For an employee who had taken the employer to court to be treated in the manner that the applicant was treated on her return could only raise one question, and that is, whether she was still wanted there or not.

It was argued on behalf of the respondent that it was possible that the management had not yet been served with the court order sanctioning the applicant's return. This

argument holds no water as the applicant did point that out to management that she was back at work on the strength of the court order. Furthermore, the respondent was represented in court when the applicant brought the urgent application challenging the transfer. It was highly unlikely that the legal representative of the respondent could not have communicated to the respondent the outcome of the application on the date the judgement was delivered. In any case, RW1 during cross-examination told the court that they received the court order on the 14th August 2002.

It was also argued on behalf of the respondent that the applicant should have exhausted all internal remedies available to her. The court was referred to the of **JAMESON THWALA Vs. NEOPAC (SWAZILAND) LIMITED, I.C. CASE NO. 18/98-** in support of that submission. That case is however distinguishable on facts from the present case. The lodging of an internal grievance is however not a requirement if it is clear that management is irredeemably prejudiced against the employee. **(SEE JOHN GROGAN: "WORKPLACE LAW" 8th EDITION**

(2005) at page 114). In this case the respondent suspended the applicant and also transferred her because she had a misunderstanding with someone who was not even an employee of the respondent. She challenged the transfer in court and the respondent lost the case. On her return to work she was again suspended and new charges included in the suspension. All these actions on the part of the respondent when looked at as a whole and their cumulative impact considered, make the court to come to conclusion that there would have been no point in the applicant lodging an internal grievance.

The code of practice in the Industrial Relations Act No.l of 2000 also put more responsibility on management to promote peace at the work place. Section 2 thereof states in part that:-

> *"...At the same time, the prime responsibility for the promotion of good working relationships rests with management, who should take the initiative in their development and pay as much attention to them as they pay to such management responsibilities as finance, marketing or production."*

The respondent clearly had the right to discipline its employee. The timing of the second suspension however, coupled with the additional charges and the treatment that she got on her return to work after having taken her employer to court could only convey one message, namely, that she was no longer wanted there. The inclusion of the additional charges was clearly meant to widen the net.

On behalf of the respondent it was argued that there was nothing strange about the suspension as the respondent had the right to discipline its employee. This argument clearly ignores the background facts of the case. The court cannot ignore the fact that the chain of events was set in motion by Brian Lunderstedt. He was not happy that he lost business because people who were supposed to stay at the Cultural Village ended up not coming. Brian Lunderstedt was not an employee of the respondent. For the respondent to charge the applicant for refusing to take instructions from Brian was clearly unjustified. Furthermore, one of the additional charges related to an incident that took place in May 2004. To bring this charge in September 2004 operated against the spirit of the respondent's own disciplinary code and procedure which provides under Article 2.02 that disciplinary action should be taken immediately.

The court taking into account all the aforementioned observations, will therefore come to the conclusion that the conduct of the respondent towards the applicant taken as a whole, and its cumulative impact properly considered, was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

The applicant was therefore entitled to sever the employment relationship in the circumstances of this case. The conduct of the respondent towards the employee was therefore such that the applicant could no longer reasonably be expected to continue in her employment.

The application will accordingly succeed.

RELIEF

The applicant prays for an order for notice pay, payment in lieu of leave, overtime, additional notice, severance allowance and maximum compensation. The applicant however was not sure how much she earned per month. She said that it was between El,500.00 and E2000.00. The court will therefore use the amount of

El,500.00 to calculate any amount due to her in order to avoid any potential prejudice to the respondent.

Furthermore, the applicant did not tell the court how many leave days were outstanding. She also did not state how many hours or days she worked as overtime. The court will therefore not make any order in respect of these two prayers. When she left the

respondent's employ, she joined Swazi Trails. The applicant is presently employed by Total Sports. She was never out of work for a long time at any point. She did not however reveal to the court how much she earned per month at these places. Taking into account all the above-mentioned factors the court will make an order that the respondent pays the applicant the following:-

a) NOTICE PAY	***El,500:00***
b) ADDITIONAL NOTICE (4yearsx 4 x E50:00)	***E800:00***
c) SEVERANCE ALLOWANCE (4years x 10 x ESO.-OO)	***E2,000:00***
d) COMPENSATION FOR THE UNFAIR DISMISSAL (El,500:00 x 8 months)	***El2,000:00***
TOTAL	***E16,300:00***

No order for costs is made.

The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT