

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 266/2002

In the matter between:

PAUL MAVUNDLA

APPLICANT

and

ROYAL SWAZILAND SUGAR CO. LTD

RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMEBR

A. LUKHELE

FOR APPLICANT

NJ. HLOPHE

FOR RESPONDENT

J U D G E M E N T 25/01/06

The Applicant brought the application for determination of an unresolved dispute pursuant to a full report issued by the Commissioner of Labour in terms of Section 41 of the Employment Act No.5 of 1980 on the 15th March 2002. The application was filed on 30 September 2002 and an amended version was launched on 23rd June 2003.

The Respondent had earlier filed in response to the particulars of

claim on the 6th February 2003. No further papers were subsequently filed.

Pleadings having been closed, the matter went to a pre-trial conference before the registrar and was there after set for trial.

In a nutshell, the Applicant claims maximum compensation for unfair dismissal being 12 months salary in the total sum of E29,472.00.

In addition the Applicant claims payment of terminal benefits as follows:-

One month's notice	E 2,456.00
Additional notice pay	E 8,512.00
Severance allowance 101 x 10 x E112.00)	E21,280.00
Leave pay 14x112.00	E 1,568.00

The basis of the claims is that on the 14th January 2000, the Respondent, wrongfully, unfairly and unlawfully terminated the services of the Applicant on allegations that he had without authority, removed and/or was in unauthorized possession of company property, to wit; two drums of petrol comprising 840 litres of petrol. The petrol had been sourced from Kangomane petrol pump, approximately 21 Kms away from the company offices.

At the time the offence was committed, the Applicant was employed by the Respondent as a Supervisor at the Parks and Garden Department. He was first employed on the 17th August

1979 and was in continuous employment for a period of twenty (20) years. He earned a salary of E2,456.00 per month.

APPLICANTS CASE

On 11th/1/1999, a Friday, he authorized purchase of four drums of petrol.

He instructed Mr. Mabila an induna driver to collect the same. He filled company requisition forms and signed. This was part of his normal duties. At about 2 p.m. in the afternoon, Mr. Mabila dropped 2 drums of petrol at the company storeroom. This petrol was sourced from the Lusoti depot. Two other drums were gotten from the Kangomane petrol depot 21 Kms from the work station. One was dropped at the Applicant's home and the other was kept at the driver's home.

The two drums at the houses were to be used to fuel the lawn mowers over the weekend. The petrol was delivered in the absence of the Applicant. He was in the field working. He saw the petrol during lunch hour. Upon return to the field, he got a radio call from one Simeon Hlophe who questioned him about the petrol that was delivered at his house.

The Applicant told the Court that he explained to Mr. Hlophe that the 2 drums dropped at the house were to be used for the lawn mowers during the weekend.

When the Applicant returned to his house, the petrol had been taken away. He was then informed by security personnel to report to the Simunye police station. At the station he found

Mabila. He recorded a statement about the events of the day. He was taken to his house, and same was searched by the police. Some toilet papers were confiscated from the house. He was charged for theft of petrol and was put in custody. He was released the following day, (Saturday) on bail. The matter was subsequently withdrawn from the Magistrate Court prior to the trial.

He was suspended from work on full pay and charged with the offence of unauthorized possession and removal of company's property to wit 210 litres of petrol and one batch of toilet papers comprising of 48 rolls.

A disciplinary hearing chaired by one Ndzinisa was held. The Applicant was dismissed after the disciplinary hearing.

He told the Court that he had bought the batch of toilet papers and some had been delivered to his house by one Jameson Mabuza.

He denied theft of the petrol and the toilet rolls.

He told the Court that it was normal during the peak season to cut grass over weekends. He would in those occasion order petrol and store it at his house or the driver's house for convenience. This was because the office would be locked over the weekend and houses were conveniently located vis a vis the area where the grass cutting was to take place. He estimated the value of 210 litres of petrol then at E400. He said that he could not be tempted to steal such, having worked for the company for a period of 20 years. He had no record of

misconduct at the work place and after all he was a preacher of the gospel and was not a thief at all.

About 4 mowers would be used over the weekend and the fuel sourced was reasonable for the task often done in summer when the grass was long.

He said that his accuser and immediate Supervisor, Mr. Simeon Shongwe was new at the work place. He had bad working relationship with him, and he had instructions to target other employees for termination a fact he had earlier disclosed to the Applicant.

No work was done that Saturday because he himself and Mabila were kept in custody. The work was done on Monday.

The Applicant believed he was targeted for termination from the company to avoid paying his terminal benefits accrued over a period of 20 years.

He had applied for retirement on medical grounds prior to the dismissal, but the Respondent declined to sanction the same.

For these reasons, he pleaded for order's prayed for in the application.

RESPONDENT'S CASE

The Respondent contends that the Applicant is guilty of dishonest conduct and was properly dismissed in terms of

Section 36 (b) of the Employment Act No.5 of 1980.

The particulars of the offence as narrated by the witnesses was that; on the 11th November 1999, a Friday, the Applicant authorized his subordinate and company driver Mr. Mabila to obtain 4 drums of petrol comprising 840 litres from the petrol pumps at Lusoti and Kangomane.

That 2 of the said drums were delivered at the appropriate storage facility of the Respondent at the offices of the Parks and Gardens Department.

The other 2 drums, were however suspiciously, and with intention to steal from the Respondent delivered at the respective houses of Mr. Mabila and the Applicant. These were the drums sourced 21 kilometres away at Kangomane.

The Respondent narrated its cause of suspecting the Applicant of the intention to steal the petrol as follows;

1. The Applicant requisitioned and authorized the transaction contrary to the company procedure that required authorization to be done by a supervisor of the person making the requisition.
2. There was no explanation why the latter drums of petrol were sourced 21 Kilometres away when petrol was available at the Lusoti pump next to the workstation. This was aimed at concealing the acquisition of the 2 drums from the authorities

3. Management had not authorized any overtime work, of cutting grass on the weekend of the 12th November 1999. The Applicant alleges that the 2 drums of petrol stored at his house and Mabila's house were to be used to fill up the mowers on the Saturday of the 12th November 1999.
4. In any event 840 litres, of petrol exceeded by far, a weekends consumption of petrol by the 4 lawn mowers in use at that time.
5. The storage of the petrol at the Applicant's house, and the house of Mabila was not allowed by the Respondent, was contrary to the company policy and procedures, and was aimed at concealing the fuel from management.

The Respondent consequently argues that the Applicant and the driver were lawfully and fairly dismissed after a properly conducted disciplinary hearing found them guilty of unlawful removal and possession of company property.

The Respondent submitted that the only reasonable inference to be drawn from the conduct of the Applicant was that he was guilty of dishonest act. His explanation of the events before the Court was unreasonable and not probably true. The court was urged by the Respondent to reject the version by the Applicant and accept that by the Respondent and dismiss the application in its entirety.

The Court's attention was further drawn to the fact that the

Carbon copy of the relevant requisition voucher in respect of the 2 drums of petrol from Kangomane was missing from the requisition voucher book. This book was in the custody of the Applicant and he did not offer any plausible explanation for the missing page.

Furthermore RW1 and RW2 strongly refuted the allegation by the Applicant that he had no access to the Parks and Gardens storeroom on Saturday morning. The Applicant had offered this as a further justification for storing the 2 drums of petrol at his and Mabila's houses. Mr. Mabila on the other hand explained that the storeroom was under renovation at the time hence the decision to store the petrol at the houses. The version by the Applicant and that of Mabila were contradictory. The further reason advanced by the Applicant for the storage to the effect that the houses were more proximate to the working sites compounded the problem.

The Court finds it difficult to accept the version by the Applicant as to why he requisitioned 2 extra drums of petrol, 21 kilometres away, and stored the same at the houses instead of the storeroom as was customary.

The intention clearly was to conceal the acquisition of the 2 drums of petrol. The mutilation of the voucher must have been done by the Applicant or his agent in furtherance of the dishonest conduct.

To evade punishment for his conduct the Applicant unwittingly, applied for retirement on medical grounds. This however came too late and the application could therefore not take priority over

the disciplinary process. This defence was to no avail.

The Applicant appear not to have had a bad record at the work place prior to this incident. Allegations by the Respondent that he had been suspected previously of dishonesty was not substantiated. He had not previously been disciplined nor did he have record of adverse warning.

The Applicant had served the Respondent for a period of 20 years.

The wording of section 42(2)(a) and (b) as follows;

"The services of an employee shall not be considered as having been fairly terminated unless the employer proves:- (a) That the reason for the termination was one permitted by Section 36;

and

(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee"

gives the Court the leverage to look further even after finding in terms of S42(a) that the dismissal was one permitted by Section 36.

Surely, the legislature contemplated a situation where the

employer even after finding a reason permitted by Section 36 to dismiss the employee was bound by S42(b) to look further to determine whether or not the employee deserved the ultimate penalty.

In this enquiry, the employer has to consider the gravity of the offence, the extent of loss or harm occasioned the Respondent by the misconduct of the employee; the previous record of the employee regarding work performance and conduct, potential for reform, and the number of years served. This list is not exhaustive.

Regarding the matter before us, the following issues come to the fore in the inquiry in terms of S42(2)(b) of the Act;

1. Though the Applicant and the driver were arrested and charged by the Royal Swaziland Police, following the discovery of the 2 drums of petrol at their respective houses the charges

n

for reasons not brought forth by the Respondent were dropped.

6. The two drums of petrol were recovered by the Respondent.
7. The Applicant in his 20 years of service did not have any previous record of misconduct with an element of dishonesty or at all.

8. The Applicant appears to have been a good worker and the Respondent did not question his ability at all.

9. There is an element of doubt as to the intention of the Applicant in bringing the 2 drums of petrol to his house and that of the driver, in daylight and in open view of the workmates, including his supervisor who detected the anomalous storage.

Accordingly, in the reading of the scales of justice, it would appear to the Court that the Respondent was not justified in applying the ultimate sentence against the Applicant.

The mitigating factors are so strong in the circumstances of the case to the extent that the Respondent has failed to discharge its onus in terms of Section 42(2)(b) in that although the offence committed may have justified a termination in terms of Section 36 of the Act, taking into account all the circumstances of the case, it was not reasonable to terminate the service of the employee.

Subsection 42(2)(a) and (b) have to be read and applied together. An employer cannot apply subsection (a) in disregard of subsection (b).

For a dismissal to be in terms of Section 36 it must not only be for an offence itemized therein, but the decision to terminate must be fair and just. If subsection (b) is disregarded as happened in this case, then the termination becomes unjust and therefore unlawful.

Having said that, regard being had to the afore running exegesis, find that this is an appropriate case where the court should not order any compensation at all for the dismissal. The Applicant is however entitled, and should be paid terminal benefits as follows:

1. NOTICE PAY	E 2,456.00
2. SEVERANCE PAY	E18,892.00
3. ADDITIONAL NOTICE	E 7,556.80
4. LEAVE PAY	E <u>1,983.66</u>
TOTAL	<u>E30.888.46</u>

No order as to costs.

The members agree.

N. NDUNA
JUDGE PRESIDENT- INDUSTRIAL COURT