IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 345/2002

In the matter between:

MICHAEL BONGANI MASHWAMA **APPLICANT**

and

SWAZILAND ELECTRICITY BOARD **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **ACTING JUDGE**

GILBERT NDZINISA: **MEMBER**

DAN MANGO: **MEMEBR**

FOR THE APPLICANT
L.R. MAMBA: **L.R. MAMBA & ASSOCIATES**

FOR THE RESPONDENT
ADV. M. VAN DER WALT: **INSTRUCTED BY CURRIE & SIBANDZE ATTORNEYS**

J U D G E M E N T 30/01/06

The Applicant brought an application for the determination of an unresolved dispute before the court in terms of Section 41 of the Employment Act No.5 of 1980.

The application is accordingly accompanied by a report of the Labour Commissioner as required by Section 41 (3) of the Employment Act.

The Applicant is a former employee of the Respondent. The Respondent is a statutory body established mainly for the generation and supply of electricity in the country.

In his statement of claim the Applicant stated that he was employed by the Respondent on the 4th January 1984. He stated that he was unlawfully dismissed by the Respondent on the 8th March 2002. At the time of his dismissal he was holding the position of Senior Manager Corporate Planning. He further stated that at the time of his dismissal he was earning a salary of E32,920:00 per month.

The Applicant's cause of action is found in paragraphs 5-6 of the statement of claim. It is stated in those paragraphs that:-

*5. Applicant was on the 8th March 2002 unfairly and unlawfully dismissed from his employment by the Respondent.

6. The dismissal was in all the circumstances unreasonable and not justifiable."

The Applicant claims payment of the sum of; E371,040:00 as compensation for unfair dismissal, E30,920:00 as notice pay, E95,570:90 as additional notice and, E238,927:00 as severance pay.

The application is opposed by the Respondent. In its Replying papers the Respondent denied that it dismissed the Applicant. The Respondent stated that the Applicant resigned from his employment on the 15th March 2002 after he had been found guilty of dishonesty, gross negligence and dereliction of duty by a properly constituted disciplinary inquiry.

The Applicant testified before the court in support of his case. On behalf of the Respondent two witnesses gave evidence, being RW1, Jerry Manana and RW2, Timothy Zwane. A number of documents were handed to court in support of each party's case. At the end of the evidence the parties' legal representatives made oral submissions and also presented written submissions.

The evidence led before the court revealed that the Applicant was employed by the Respondent on the 3rd January 1984 as a trainee. He rose through the ranks and became PTM Manager. By PTM Manager is meant Protection Telecommunication and Metering Manager. The Applicant was suspended on 24th July 2000 following an inquiry held into the procurement procedures in his department. The Applicant was PTM Manager during the period 1995 to 1999.

The Respondent set up the inquiry to probe allegations that procurement procedures were being flouted. The Applicant was eventually charged, and ten charges were preferred against him.

The charges included, inter alia, that of conducting his business during the Respondent's working hours; breach of the terms and conditions of service; approving of purchase requisition without authority to do so; dishonesty and intimidation.

The Applicant in his evidence in chief told the court that he was served with the charges on the same day of the hearing. He however retracted this statement during cross-examination. He also told the court that the report of the hearing was given to him after he had tendered his resignation. The evidence by RW2, Timothy Zwane however revealed that the Applicant was shown the record of the proceedings, and it was discussed with him.

In his statement of claim the Applicant said that he was dismissed on the 8th March 2002. The evidence led before the court however did not support this claim. The letter dated 8th March 2002, which the Applicant's attorney sought to rely upon as the basis of the dismissal during the submissions was written by the

Respondent's Acting Managing Director. It is exhibit "G". It gave the Applicant an option to resign on the 15th March 2002 or face dismissal as per the findings of the tribunal. The Applicant elected to resign and he said that was to his advantage as he was going to get his pension.

The evidence before the court therefore clearly showed that at

no stage was the Applicant dismissed by the Respondent. The evidence showed that the Applicant indeed resigned on the 15th March 2002 by letter marked exhibit "H".

The essence of the Applicant's evidence before the court was that he was tricked into resigning by the Respondent. He said that he was told that he had been found guilty on all the charges that he was facing, including charges of dishonesty. He said that he would not have resigned had he known that he had been cleared on the charges involving an element of dishonesty.

This evidence by the Applicant was however not correct. RW2, Timothy Zwane told the court that the Applicant had been made fully aware of the findings of the tribunal. The court will therefore accept as proved that when the Applicant tendered his resignation, he was fully aware what charges he had been found guilty on, and what charges he had been found not guilty.

This was not therefore a case where the employer for no reason asked the employee to resign or face dismissal. The position in this case was that, the Applicant having been found guilty, he was given a chance to mitigate. In mitigation he raised the point that he had a clean record of eighteen years of service to the Respondent. The chairman was persuaded by this submission and he recommended that the Applicant be given an option to resign.

The letter of the 8th March 2002 must therefore be understood

in that context. The Respondent was giving the Applicant an opportunity to tender his resignation within seven days, failing which the dismissal would be effected as per the recommendation of the chairman. When the Applicant tendered his resignation on the 15th March 2002, he was therefore exercising that option, not that he resigned because was being threatened with dismissal.

It is also important to note that the letter of the 8th March 2002 written by the Respondent to the Applicant stated clearly, inter alia, that:-

"(a) You have been found guilty of the offences set out in the disciplinary report.

(b) The appropriate sanction for the offences of which you have been found guilty is dismissal."

As the evidence showed that the Applicant was made fully aware of the report and the charges on which he had been found guilty, his evidence that he had not seen the report before he wrote the letter of resignation, and that he would not have resigned had he known that he had not been found guilty on the charges of dishonesty, will therefore be dismissed.

The Applicant was holding the position of Senior Manager Corporate Planning when he resigned. He is a Chartered Electrical Engineer. He has an Honours Degree in Electrical Engineering and he holds a Masters in Business Administration. He is a member of the Institute of Electrical Engineers. After

having been given a period of seven days to consider the option of resigning, it is not known why he did not avail himself of legal opinion on the matter.

The Applicant is clearly an above-average member of the society. There can be no doubt therefore that he understood the contents of the disciplinary report and that he opted to resign in order to retain his benefits.

It was argued on behalf of Applicant that the Respondent had failed to prove before the court that the Applicant was dismissed for an offence permitted by section 36 of the Employment Act. It was argued that the Respondent having failed to lead evidence before this court proving the commission of the charges leveled against the Applicant, it cannot be said that the Respondent has discharged the onus resting on it. The court was referred to this court's judgement in the case of **PAUL MKHATSWA Vs. INYATSI CONSTRUCTION I.C. CASE NO. 259/99.**

The ratio *decidendi\n* that case was that the Industrial court makes a decision based on the evidence presented before it, and not on the basis of the findings of the chairman of the disciplinary hearing.

The court in that case followed the Industrial Court of Appeal decision in the case of **CENTRAL BANK OF SWAZILAND Vs. MEMORY MATIWANE I.C.A. CASE NO. 110/1993** where Sapire IP. held at page 2 that:-

w The court a quo does not sit as a court of appeal to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it It is the duty of the Industrial Court to enquire on the evidence place before it, as to whether the provisions of the Industrial Relations Act and the Employment Act have been complied with and to make a fair award having regard to all the circumstances of the case

In the Mkhatshwa case, the Applicant denied that he assaulted the three guards that it was alleged he assaulted. The evidentiary burden then shifted to the Respondent to prove the alleged assaults. The Respondent failed to lead the evidence of the victims to prove the assaults on them. The court accordingly held that the Respondent had failed to discharge the burden of proof in terms of Section 42 (2)(a) of the Employment Act, namely that the Applicant was dismissed for assaulting the three guards.

In the present case however, the Applicant did not deny that he was involved in the running of a company called Autotrek Systems (Pty) Ltd. His defence was only that he was not involved with the company on a full time basis. He admitted during cross-examination that he did received calls from the employees of Autotrek during working hours. He said he did not see that as a big issue. It is interesting to note that the Applicant did reveal to the Respondent Management that he operated a health club. He told the court that he did get a verbal approval to run the health club. The question that arises

is why did he not also reveal and seek approval of running his other businesses?

At this point it is important to look at the provisions of the conditions of employment of the Respondent. The Applicant conceded that the letter of appointment did have this document. The relevant provisions provides the following:-

An employee shall devote himself during the working hours exclusively to the discharge of his duties.

11. **ENGAGING IN BUSINESS FOR PROFIT**

No employer shall engage for profit, either in or out of duty hours, in any business or occupation other than his duties to the Board, without the consent of the Board."

Charges 1 and 2 were that of violating article 11.

The Applicant was found guilty by the tribunal.

The Applicant having not denied that he was involved in the running of Autotrek there was therefore no need for the Respondent to call witness to prove that. The Applicant also did not dispute the contents of Exhibit "P", being a resolution by board members of Autotrek Systems (Pty) Ltd on company representation showing the Applicant as one of the three Managers and he being the Finance and Administration Manager.

The evidence however revealed that there were no clear procedures relating to procurement. No such procurement procedures were produced in court by the Respondent. RW1, Jerry Manana told the court that the procedures were in existence but were not formalized.

Clearly, the Respondent was not able to prove on a preponderance of probabilities that there was in existence a clear and/or established procurement procedure at the Respondent's place at the material time.

The Respondent managed to prove that the Applicant did breach the provisions of the Respondent's terms and conditions of service. Even if the Applicant did not resign therefore, the Respondent would have been entitled to dismiss him in terms of section 36(L) of the Employment Act. The conduct of the Applicant to operate a business without the consent of the employer clearly amounted to dishonesty. (See **CARTER V. VALUE TRUCK RENTAL (PTY) LTD (2005) NO. IU 711 AT 724; LE ROUX & VAN NIEKERK:** "The South African Law of unfair Dismissal" (1994) Juta & Co. at page 131).

The court will therefore come to the conclusion that the Respondent has proved on a balance of probabilities that the Applicant was not dismissed but he resigned on the 15th March 2002. The evidence revealed that the Applicant had gone through the report of the tribunal and was aware of which charges he had been found guilty on. The Applicant was given

seven days to consider tendering a resignation letter rather than be dismissed because of his hitherto unblemished record. He duly exercised the option to resign.

Taking into account the abovementioned observations and the totality of the evidence presented before the court, the Applicant's application is dismissed.

The Applicant is however entitled to his terminal benefits following his resignation.

There is no order for costs

made. The members agree.

NKOSINATHI NKONYANE
ACTING JUDGE - INDUSTRIAL COURT