IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 105/05

In the matter between:

COLLIE DLAMINI **APPLICANT**

And

SWAZILAND ELECTRICITY BOARD **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **JUDGE**

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: **MR. A. LUKHELE**

FOR RESPONDENT: **MR. M. SIBANDZE**

JUDGEMENT 18.05.07

[1] The applicant in this case is a former employee of the respondent. She claims in her papers that she was unlawfully dismissed by the respondent on the 15th

October 2003.

[2] She stated in her papers that her dismissal by the respondent was both procedurally and substantively unfair because: -

(a) The dismissal was contrary to the findings and recommendations of the chairperson of the disciplinary enquiry.

(b) There were no lawful grounds for the dismissal.

(c) The dismissal was unreasonable in the circumstances of the case.

[3] The applicant now claims terminal benefits as follows: -

a)	Notice pay	E39,995.75
b)	Additional Notice	El 8,459.48
c)	Severance allowance	E46J48.70
	TOTAL	E104,603.70

[4] She also claims re-instatement failing which maximum compensation equivalent to twenty-four months salary amounting to E959,898.00. This claim was however amended in court to read that she is claiming twelve months' salary, as there was no legal basis for the claim of twenty-four months' salary.

[5] The respondent in its papers disputed the applicant's claim. It averred that the applicant was lawfully dismissed in terms of section 36(J) of the Employment Act, No.5 of 1980.

[6] The applicant reported the matter to the Conciliation Mediation and Arbitration Commission (CMAC). The matter was not resolved there and thus the applicant instituted the present proceedings in terms of section 85 of the Industrial Relations Act No. 1 of 2000 (as amended).

[7] Two witnesses testified before the court. It was the applicant herself and RW1, Mr. Sifiso Dlamini. Mr. Dlamini was called to testify only on the question of re-instatement. The respondent was unable to lead a witness on the merits of the case.

[8] The court was told that the respondent's main witness, the former Managing Director, Mr. Themba Tsela was unwilling to come and testify on behalf of the respondent. The court learnt that Mr. Tsela has since relocated to South Africa.

[9] Mr. Sibandze stated on the onset the difficulty that the respondent might have in trying to make out a case against the applicant in the absence of the star witness. The court granted an application for a postponement in order to allow him to take further instructions from his client, the respondent.

[10] When the matter was again called, Mr. Sibandze informed the court that his client had instructed him to continue with the trial.

[11] It is easy to understand why Mr. Sibandze foresaw the difficulty in proceeding with the matter when it became clear that the star witness was not going to testify. In terms of section 42 of the Employment Act, the burden of proof is on the employer to prove that the termination of an employee's service was substantially and procedurally fair, and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.

[12] The employee's burden is only to prove that at the time of the termination, he/she was an employee to whom section 35 of the Employment Act applied.

[13] The applicant managed to discharge the burden of proof that rested on her. It only remains to be considered by the court if the respondent was able to discharge the burden of proof that rests on an employer in unfair dismissal matters.

[14] The evidence led before the court revealed that the applicant started to work for the respondent on the 1st September 1999 as a Senior Manager, Internal Audit. She worked continuously until 15 October 2003 when she was dismissed.

The dismissal followed a disciplinary hearing where the applicant was found guilty on two charges of gross insubordination. The applicant appealed against this finding but her appeal was not considered as it was found to be time barred.

The disciplinary hearing was chaired by Advocate Magriet van der Walt. She stated in her findings that:

"If at all possible, a final written warning. Dismissal only as a last resort, and only if it is clear that no form of warning, or any other possible sanction, would achieve the desired result of a reasonable industrial and operational working relationship within the organization."

The evidence also revealed that Mr. Tsela joined the respondent in August 2002, three years after the employment of the applicant. The applicant said she worked with Mr. Tsela for only twenty-one days.

The applicant told the court that she had a good working relationship with all the managers. She said Mr. Tsela was a busy man and the two of them seldom met. She said one day the two of them met and discussed her department's projects.

She said as part of her duties she carried out investigative work. She would then produce two sets of reports. One would deal with issues that required disciplinary measures to be taken and the second one would reflect matters of control that needed to be addressed. When she met Mr. Tsela, the reports had been discussed by the Executive Committee.

She said the issues in the report were thereafter not part of her jurisdiction.

Mr. Tsela, following the meeting that he had with the applicant, wrote a memorandum that appears on page 5 of "Bundle A". Mr. Tsela addressed that memorandum not to the applicant but to the General Manager- Corporate Services. It was copied to B. Masangane and S. Dlamini.

The applicant responded to this memorandum. She said she felt that she had to do that with a view to clarify some of the things that appeared in Mr. Tsela's memorandum. Her response appears on page 6 of "Bundle A".

Mr. Tsela responded by writing a memorandum that appears on page 9 of "Bundle A" and accused the applicant of insubordinate behaviour. That was the beginning of the applicant's woes.

One day Mr. Tsela called her to his office and asked her to leave the respondent's place. Mr. Tsela asked her to take casual leave. She said she could not do that, as she had no reason to

do so. She said the directive to leave the respondent's place was first made by Mr. Tsela at 6.00 p.m. when he called her and told her not to come to work. She said she told him that she was going to show up lest she was accused of absconding.

When she reported for work on the following day, Mr. Tsela called her to his office and told her to leave the respondent's place. She said Mr. Tsela, threatened to call the police who would throw her out. She said she was really shocked and she left and went back to her office. Whilst in her office the Risk Manager came and told her to leave the respondent's premises.

The verbal instructions by the Risk Manager were then reduced into writing. That memorandum appears on page 10 of "Bundle A". The memorandum stated: -

"Re: Managing Director - Instructions

I have been instructed by the Managing Director to request you to leave the SEB premises as of 14:00 hrs on the 23rd August 2002 not to return until I am instructed otherwise. Kindly oblige with the instruction."

The applicant obliged. She then took up the matter with her attorneys. She thereafter received a suspension letter. Further to that, she received a letter

containing charges and an invitation to a hearing. The hearing was postponed from time to time until 14 October 2002. The members of the hearing panel were; Mr. Derrick Hlandze, Mr.Musa Ndlela and John Sibandze (chairperson). The applicant was represented by Zodwa Mkhonta and Sibongile Myeni.

The decision of the panel was that the matter was not significant and did not require a disciplinary hearing.

A second disciplinary hearing was set up which was chaired by Advocate Magriet van der Walt.

There was no explanation as to why the respondent considered that it was still important to hold a disciplinary hearing in the light of the advice of the first disciplinary hearing panel.

A large part of the applicant's evidence was not challenged during cross-examination. Mr. Sibandze asked the court to consider the contents of the two memoranda, which formed the basis of the charges levelled against the applicant. The memoranda are the ones that appear on pages 5 and 6 of "Bundle A".

The applicant denied that she was insubordinate to the former Managing Director, Mr. Tsela. She said she wrote the memorandum on page 6 because she wanted to clarify certain things that were not correctly captured by the former Managing Director in his memorandum on page 5.

The applicant said Mr. Tsela's memorandum misrepresented what the two discussed during the meeting that they had. During the cross-examination the following transpired: -

"Q. It seems that you are telling the M.D. that you were not prepared to discuss the forensic report with Dlamini and Masangane.

A. Yes."

The applicant explained in her memorandum why she was not prepared to discuss the report. On paragraph 12 of her memorandum she stated that: -

"/ did emphasize that the issue of the Forensic report is not a subject for discussion, neither with Mr. Sipho Dlamini nor with Mrs. Masangane, because it is already above their level. It is no longer a matter for discussion by the Internal Audit Department with management, but a matter to be presented to the Audit Committee on its status as per the decision of the Executive Committee...."

The question that arises is, was it wrong for the applicant to put things in correct perspective if she felt that she was being misrepresented? We do not think so. The applicant was not just an ordinary employee of the respondent. She was a senior manager of a department. She had the duty not only to perform her duties the best she could, but she also had a duty to perform such duties in line with the dictates of professionalism and ethics of the office she was holding. The court does not believe that the applicant was not entitled to respond with a view to correct what she considered not a true representation of what they discussed in the meeting.

[36] From the way things turned out, one can only conclude that Mr. Tsela either did not understand or appreciate the functions of the office of the applicant. If he did, he clearly would not have reacted in the manner that he did to the applicant's memorandum.

[37] Further, Mr. Tsela's memorandum was directed to the General Manager- Corporate Services and not to the applicant. Part of the memorandum reads as follows: -

"I met with Collie Dlamini for 3 hours yesterday and all I can say is that she is unhappy with the way DEVCOM(then Executive Team) handled her report on the mismanagement at stores. She is taking the matter to the Audit Committee which means I have to

answer on why we let these things go unpunished.

My suggestion - up to you to take it - is that you call Collie, Busi and Sipho did give Collie the opportunity to state her concerns on the mismanagement at stores. In the end, we

cannot ignore an internal audit report - even if we do, the Audit Committee can still come out hard on me/us. Pity I was not even here when all these things happened."

The court does not see how it can be said that the applicant was insubordinate as the memorandum was addressed to the General manager- Corporate Services. Further, Mr. Tsela himself said, **"my suggestion - up to you to take it - is that you call in Collie"**

Nowhere in this memorandum is the applicant being instructed to attend a meeting. It is not clear to the court why the applicant was said to have refused to obey an instruction to attend a meeting.

Unfortunately Mr. Tsela did not testify before the court. The court did not have the opportunity to get his version of what transpired in the meeting that he held with the applicant. Presently, the applicant said that Mr. Tsela's memorandum misrepresented what was discussed in that meeting. Her evidence in that regard remains unchallenged.

The applicant was also found guilty for gross insubordination in that she accused the Managing Director of lying.

[42] This charge was based on the applicant's conduct of copying her memorandum to two other employees, that is, S. Dlamini and B. Masangane.

[43] The chairperson of the disciplinary hearing found the applicant guilty on this charge. The chairperson stated in her findings that:

"// was distributed to other parties by Mrs. Dlamini (the applicant), thereby spreading the word that Mr. Tsela could not be trusted."

[44] It is not clear how the chairperson reached this conclusion. The court does not see how it can be said that it was wrong for the applicant to also copy the memorandum to these employees as Mr. Tsela's memorandum was also copied to them. There was no evidence that other employees at the workplace other than these two saw the memorandum.

[45] It seems to the court that Mr. Tsela missed an opportunity by having the applicant dismissed. The applicant seems to have been a strict and professional manager. She clearly would have contributed to the advancement of Mr. Tsela's career at the respondent's place.

[46] Mr. Sibandze referred the court to various authorities and urged the court to find that the applicant was insubordinate. He referred the court to the case of OSCAR Z. MAMBA V. SWAZILAND DEVELOPMENT & SAVINGS BANK, CASE NO**.81/96** (IC), for the proposition that one incident of serious misconduct can have the effect of cancelling any hitherto unblemished record of good service.

The Mamba case is clearly distinguishable from the present case. In the Mamba case the evidence clearly showed that Mamba was guilty of negligence and dereliction of duty, which resulted in great loss being suffered by the respondent bank.

In the present case there was no evidence of negligence or dereliction of duty by the applicant. Further, in this case the court is unable to find that the applicant committed any acts of misconduct against the Mr. Tsela. The respondent in this case did not suffer any loss by the conduct of the applicant. If there was anything, it seems that it was only the Managing Director who suffered injury to his ego.

Mr. Sibandze also referred the court to the book by LE ROUX **and** VAN NIEKERK AT PAGES **137-141** where the learned authors deal with the subject of "insolence and insubordination". At page 140 the authors stated that:

"The most important subspecies of insubordination is the refusal to obey a lawful instruction. The duty to obey is fundamental to the employment relationship ..."

As already pointed out, there was no evidence before the court that the applicant was given an instruction and she failed to obey it.

The court was also referred to the case of **SLAGMENT (PTY) LTD V. BUILDING CONSTRUCITON & ALLIED WORKERS UNION & OTHERS (1994) 15 ILJ 979 (A).**

That case dealt with the question of deliberate disobedience and failure to carry out instructions by two employees. Again, the present case is distinguishable on the facts, as the respondent in this case has failed to prove that the applicant was given an instruction, which she failed to carry out.

In the letter by the respondent terminating the applicant's service it was stated, *inter alia*, that:

"4. It was the finding of the disciplinary panel that you

distributed your statement to other employees and gave the impression that the Managing Director could not be trusted.

5. It is difficult in the circumstances to conceive the working relationship between yourself and the employer, who is represented at the workplace by the Managing Director, being tolerable or workable in future.

d) ***This is further aggravated by your unrepentant attitude.***

e) ***The Board has no option but to find that it can no long be expected to continue to employ you and the circumstances you are advised that your services are summarily terminated with effect from 15th October, 2003."***

It is not clear to the court on what basis did the respondent say in that letter that it was difficult in the circumstances to conceive of a working relationship between the applicant and the employer.

There was no evidence that the employer did convene a meeting where the applicant and Mr. Tsela met to see if a way forward could not be achieved. That was precisely the recommendation of the chairperson who said that dismissal could be a last resort. The applicant told the court that she had no problem working under the leadership of Mr. Tsela.

The disciplinary code of the respondent was not produced in court. The court is not aware what it provides as the possible sanctions in such instances.
Further, the court was not told why the respondent ignored the findings of the first disciplinary hearing panel to the effect that the matter was trivial and could be resolved by conciliation.

The applicant was a credible and reliable witness. The court therefore accepts her evidence as the correct version of the events that led to her dismissal.

It follows therefore that it cannot be said that the respondent has discharged the burden resting upon it to prove that; a) the reason for the termination was one permitted by section 36 and b), taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant. **(See: section 42(2) (a) and (b) of the Employment Act.)**

Taking into account all the above observations and the evidence presented before the court, the court will come to the conclusion that the applicant was unlawfully and unfairly dismissed by the respondent.

RELIEF: -
The applicant is asking for an order for re-instatement, alternatively payment of terminal benefits and compensation for the unfair dismissal.

The respondent argued that it was not possible for the applicant to be re-instated, as her position no long exists as a result of restructuring. The court was told that as the result of the restructuring, the applicant's post was abolished.

The applicant disputed the evidence that her post was abolished. She said as far as she knew the post has not been abolished.

The respondent then led its only witness in this case, Mr. Sifiso Dlamini. Mr. Dlamini's evidence was however not helpful to the court. He was not yet employed at the respondent's undertaking when the alleged restructuring took place.

Mr. Dlamini showed the court a document that was marked "R2" as representing the new structure, which does not have the applicant's position.

The witness was unable to produce to the court the minutes of the meeting in which the new structure was adopted or approved. The witness showed the court a document marked "R3" as the minutes of the meeting in which the new structure was approved.

Document "R3" however clearly shows that these are minutes of the special meeting of the Honourable Minister of Natural Resources and the Board of the respondent held at the Ministry on the 4th August 2003.

The meeting was a briefing of the respondent's Board by the Minister that Cabinet had approved the restructuring report prepared by Price Waterhouse Coopers. The minutes reflect on page 3 that: -

"SEB Board Chairman:

The chairman's response was that it was true that the affected managers were never consulted.

SEB Managing Director:

He stated that the Board resolved to place the Senior Managers on contract and hat (sic) board resolution was communicated to them and promised that they would be consulted on a one to one basis, prior to implementation of any

restructuring and changes in employment conditions. This was going to be done after approval of the restructuring by Cabinet."

It is unbelievable that a reputable company like the respondent can put a new operational structure in place without formally approving it in a meeting in which minutes are taken.

From the evidence presented by the respondent, it cannot be said that the respondent has proved on a balance of probabilities that the organogram marked "R2" is a genuine document that proves that the applicant's position was abolished. Further, even if the court were to find that the document is genuine and that therefore the applicant's position was abolished, the respondent should have anticipated that the applicant was going to challenge her dismissal and it should not have abolished the position before the decision on the lawfulness or otherwise of her dismissal was made.

The applicant is married and has four children. She is not currently employed. She said she has tried to secure alternative employment but was not able because of the record of dismissal.

The applicant lost a property which she had bought through a loan by the Swaziland Building Society. She had bought the property jointly with her husband. The property was valued at E220,000:00. When it was attached, there was remaining the sum ofE28,520.03.

In her papers the applicant stated that she was earning a monthly salary of E39,995.75 inclusive of benefits per month. The amount was disputed by the respondent. Her salary advice showed E34,981.50 The parties agreed that the salary be reflected as E35,000:00 per month.

The evidence further showed that the applicant's motor vehicle was also repossessed. She had bought the car through the company scheme. She said the manner that the motor vehicle was repossessed was so humiliating to her as she

was virtually dislodged whilst in the company of her children in town.

The court is alive to the provisions of section 16 (2) (c) of the Industrial Relations Act, No.l of 2000 (as amended). That section deals with the remedial powers of the court and states that the court shall require the employer to re-instate or re-engage the employee unless it is not reasonably practicable for the employer to re-instate or re-engage the employee.

The court does not think that employers should be allowed to unlawfully dismiss their employees and thereafter come and argue before the court that it is not reasonably practical to reinstate or re-engage the employee because his or her position has since been filled.

Such an argument has the effect of defeating the purpose and spirit of section 16 of the Act.

Whether or not it is reasonably practicable for the employee to be re-instated or re-engaged is for the court to decide after taking into account all the evidence before it and all the circumstances of the case.

[79] The court must also take into account the prejudice suffered by the applicant occasioned by the lack of income and lose of properties as the result of the unlawful and unfair dismissal, and also the prejudice to be suffered by the respondent if the applicant is re-instated and it is ordered to pay the applicant for the period that she did not render service to it.

[80] It is unfortunate that our laws do not provide for an interim reinstatement pending the judgement of the court or the conciliation process.

[81] The evidence before the court showed that the applicant had a misunderstanding with only one person at the respondent's place. That person is no longer employed there. Even if he was still there, the applicant told the court that she would have no problem working with him again.

[82] The applicant was dismissed in October 2003. She has been out of employment for three years and eight months. However, it would be unduly onerous on the respondent to pay arrear wages for three years and eight months taking into account that no services were rendered by the applicant during that period.

[83] In terms of section 16 (1) of the Industrial Relations Act, the court has a discretion to make an order for re-instatement, re-engagement or payment of compensation.

[84] Having taken into account all the above observations and all the circumstances the court will make the following order:

a) The respondent is ordered to re-instate the applicant in the position that she previously held or any other suitable position commensurate with her qualifications and experience, and with a pay scale not less than that at which she was previously paid.

b) The respondent is to pay the applicant arrear wages for one and a half years from 1st November 2005 to 31st May 2007 by no later than 31st may 2007.

c) The applicant is to report at the respondent's place to resume her duties on the 1st June 2007.

d) The respondent is to pay the costs of the application.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT