

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 314/2010

In the matter between:-

JAMES M. MBATHA

Applicant

AND

GREEN SEA TRANSPORT

Respondent

Neutral citation: *James M. Mbatha vs Green Sea Transport 314/2010*
 [2019] SZIC 144 (December 14, 2018)

Coram: **N. NKONYANE, J**
 (Sitting with **G. Ndzinisa** and **S. Mvubu**
 Nominated Members of the Court)

Heard submissions: 06/12/18

Judgement delivered: 14/12/18

SUMMARY---Labour Law---Applicant employed by the Respondent as a bus driver---Applicant dismissed for causing the “diff” of the bus to

seize---Evidence that the Applicant first heard the noise of the wheel hub at Siphofaneni---Applicant failing to stop immediately to inspect the cause of the noise until the “diff” seized and bus unable to move when it was in Manzini---Applicant verbally dismissed by the Respondent on the following day.

Held---The dismissal was procedurally unfair as no disciplinary hearing was held prior to the dismissal of the Applicant.

Held further---Where the negligence of the accused employee was so gross that it can be assumed that the employee foresaw or should reasonably have foreseen the possibility of damage to property, dismissal may be justified.

JUDGEMENT

- 1.** The Respondent is a company that is locally registered in terms of the Companies Laws of the Kingdom of ESwatini. It is involved in the business of passengers and goods transportation. It is based in Ngwane Park, Manzini Region.
- 2.** The Applicant is a former employee of the Respondent. He was employed by the Respondent as a driver of one of the Respondent’s

buses that services the Manzini – Siphofaneni – Hluthi route. He was employed in April 1999 and was dismissed on 31st March 2010.

3. The Applicant's dismissal was verbal and was communicated to him by the owner of the bus, RW1, Zephaniah Ngobeni. The Applicant was aggrieved by the Respondent's conduct and he reported a dispute with the Conciliation Mediation, and Arbitration Commission (CMAC). The dispute could not be resolved by conciliation and a certificate of unresolved dispute was issued by the Commission. The Applicant thereafter instituted the present application for determination of the unresolved by the Court.
4. In his papers the Applicant claims that he was terminated by the Respondent without any reason and that his termination was unlawful, unfair and unreasonable in all the circumstances. The Applicant is claiming re-instatement or alternatively payment of terminal benefits and maximum compensation.
5. The Respondent opposed the Applicant's application and filed its Reply thereto. The Respondent stated in its Reply that the Applicant's services were terminated on 31st March 2010 after he had confessed that he drove the bus from Siphofaneni to Manzini knowing that the hub had no oil

which caused the differential gear (“Diff”) to seize and the parties agreed to go separate ways.

6. Before the Court, the Applicant and the owner of the bus, Zephaniah Ngobeni gave evidence which was largely common cause. The evidence revealed that the Applicant drove the Respondent’s bus that he was employed to drive from Manzini to Hluthi on that fateful day. The Applicant told the Court that on his return trip in the afternoon and whilst he was driving past the Satellite Bus Rank in Manzini, he heard some noise coming from the rear. He stopped the bus, alighted and went to inspect the source of the noise. He noticed some oil leak from the rear wheel hub. The bus could not move after that as it turned out that the “diff” had seized.
7. The owner of the bus, RW1, caused another bus to go and tow the bus from the Satellite Bus Rank to Ngwane Park, the residential place of RW1.
8. The evidence before the Court also revealed that in March 2000 the Applicant allowed one of the bus conductors to drive the bus at Manzini bus rank after all the passengers had alighted. The bus crashed into another motor vehicle. The Applicant was dismissed by the Respondent

as the result of that incidence. The Applicant was however recalled and re-employed after six months, in September 2000.

9. The Applicant was verbally dismissed by the Respondent. There was no evidence that a disciplinary hearing was held to afford the Applicant the opportunity to present his side of the story.

10. In his application the Applicant is also claiming payment of the amount of E12, 600:00 as underpayment. The Applicant only alluded to the issue of underpayment in his prayers. He did not explain how the underpayment came about. In Court, the Applicant said he was being paid a monthly salary of E800.00. He told the Court that upon his termination, he was paid a sum of E1, 500:00.

ANALYSIS OF THE EVIDENCE AND THE LAW:

11. UNDERPAYMENT:

The Applicant clearly failed to support the claim for underpayment. The Applicant was first employed in May 1999 as a heavy duty bus driver. There was no evidence before the Court as to how much was the lawful statutory salary for heavy duty bus drivers during that period. RW1 denied that the Applicant was being underpaid. He told the Court that if the Applicant was being underpaid he could not have kept quiet

from 1999 and only raise the issue about ten years later in 2010. He told the Court that the Applicant's salary was E1, 500:00 per month.

12. The Applicant's representative filed in Court a **Regulation of Wages (Road Transportation) Order of 2006** which was issued under **Legal Notice NO. 182 of 2006**. The Court is not sure what was the purpose of filing this document as the dispute between the parties arose in 2010. There was no evidence that this **Regulation of Wages Order of 2006** was still applicable in 2010. Further, in terms of this Legal Notice, the basic minimum wage per week is categorized in terms of the capacity or number of passengers that the bus is licenced to carry. There was no evidence led before the Court as to the capacity of the bus that the Applicant was employed to drive.

13. The Court will therefore come to the conclusion that the Applicant failed to support the claim for underpayment.

14. PROCEDURAL FAIRNESS:

RW1 told the Court that he dismissed the Applicant as the result of the damage to the bus that was caused by the Applicant. It was not in dispute that there was no disciplinary charge that was preferred against the Applicant. The Applicant was verbally dismissed by RW1. The

dismissal of the Applicant was therefore procedurally unfair. Dealing with the question of fair procedure, **John Grogan: Workplace Law, 8th edition at page 119** stated the following principle;

“All that needs to be stressed at this point is that procedural fairness and substantive fairness are independent criteria; a dismissal is unfair if the employer failed to follow a fair procedure, no matter how compelling the reason for the dismissal may have been.”

15. The Court is in respectful agreement with this principle of the law, and when applying it to the present case, the conduct of RW1 is clearly wanting and the Court will come to the conclusion that the dismissal of the Applicant was procedurally unfair.

16. SUBSTANTIVE FAIRNESS:

RW1 told the Court that the Applicant was dismissed as the result of the damage caused to the bus. RW1 told the Court that when he enquired about the matter the Applicant told him that he first heard the sound from the rear part of the bus at Siphofaneni. The Applicant did not stop the bus to inspect the source of the noise but drove the bus until it reached Manzini.

17. The Applicant denied that he said he first heard the noise at Siphofaneni. The Court was therefore faced with two mutually destructive versions on this important issue. The point at which the Applicant first heard the noise is important because it will show the state of mind of the Applicant. That is important in this matter because the Applicant told the Court that they had serviced the hub on the previous day. He told the Court that in his view the fault could be attributed to the mechanic who might have fastened the bolts very tight. If the Applicant first heard the noise at Siphofaneni there was all the reason for him to stop and inspect the source of the noise.

18. The Court had occasion to deal with a similar situation where the parties gave opposed versions in the case of **Owen Nxumalo v Standard Bank Swaziland Ltd, case number 511/2010 (IC)**. In that case Dlamini J referred to the case of **Stellenbosch Farmers Winery Group Ltd & Another v Martell Et CIE & Others 2003 (I) SA 11 (SCA)** where **Nienaber JA** held as follows at paragraphs 14 I-15 G;

“The technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarized as follows; to come to a conclusion on the disputed issues a Court must make findings

on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence. (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions; (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.....”

- 19.** The Court had the opportunity to observe the witnesses whilst giving their testimony. The Applicant did not appear as a forthright and truthful witness. He was overly defensive and denied everything that had the potential of negatively affecting his case even when there was clear evidence to the contrary. For example, when it was put to him that he did not state in the letter that he wrote to RW1 on 07 April 2010 (Page 9 of the Book of Pleadings) that he was unfairly dismissed, the Applicant denied that. The fact of the matter however is that the Applicant did not do so in that letter. Further, the Applicant's

demeanour in the witness box was not impressive. He hardly faced the members of the bench but spent most of the time facing down.

20. RW1 on the other hand appeared to the Court as a forthright and impressive witness. He was not hesitant when answering questions put to him during cross examination. He was asked few questions by the cross examiner. His evidence as to how the bus suffered the damages that it did was not successfully challenged. His evidence remained intact after the cross examination. There was also undisputed evidence that after the Applicant was first dismissed for having allowed the bus conductor, Kenneth Simelane to drive the bus and was involved in an accident, RW1 was able to re-employ the Applicant after having been away for a period of six months. Again, even after the second dismissal, RW1 was prepared to take the Applicant back to his employment as per the written offer in Exhibit B (pages 17 – 18 of the Book of Pleadings). This conduct by RW1 shows the Court that he has a forgiving heart and therefore highly unlikely to manufacture false evidence against the Applicant.

21. The Court therefore accepts the evidence by RW1 that it was the Applicant who revealed to him when questioned about the cause of the mechanical damage to the bus, that he first started to hear the noise

when the bus was at Siphofaneni but he continued to drive the bus until it reached Manzini because he wanted to sleep in his house. According to the Applicant's evidence the hub had been fixed or attended to by the Respondent's mechanic on the previous day. It was therefore incumbent upon the Applicant to stop the bus and inspect the cause of the noise in order to ascertain whether it was not coming from the part that had been fixed on the previous day. The Applicant did not do that. Dealing with the subject of willful damage to property, **John Grogan (op.cit)** at page 173 stated as follows:

".....Where, however, the negligence was so gross that it can be assumed that the employee foresaw or should reasonably have foreseen the possibility of damage to property, dismissal may be justified."

22. Similarly, in casu, the Court will come to the conclusion that this was one such case where the conduct of the Applicant of failing to stop the bus soon after he started to hear the noise amounted to negligence that was so gross such that it could be assumed that the Applicant foresaw or should reasonably have foreseen the possibility of damage to the property of the Respondent. In the circumstances of this case, the dismissal of the Applicant was justified. The Court will therefore come to the conclusion that the dismissal of the Applicant was for a fair

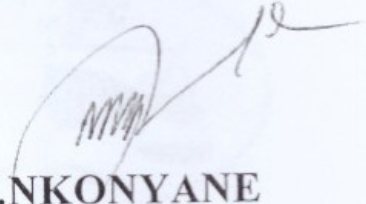
reason, and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant.

RELIEF:

23. The Court having found that the dismissal of the Applicant was only procedurally unfair, the Court can only make an award for compensation. **(See: Section 16(4) of the Industrial Relations Act No.1 of 2000 as amended).**
24. The Applicant has managed to find alternative employment. He told the Court that he is currently employed by Inyatsi Construction Company. He is married and has three children. There was evidence that the Respondent did make an offer to take the Applicant back to its employ. There was no clear evidence why the Applicant did not want to go back. The Applicant had been in the Respondent's employ for about ten years. Taking into account all the personal circumstances of the Applicant, the interests of justice, fairness and equity the Court will award the Applicant compensation equivalent to three months' salary.
25. The Court will accordingly make the following order;

- a) *The Respondent is to pay to the Applicant the sum of (1,500 x 3)
E4,500.00 as compensation.*
- b) *There is no order as to costs.*

26. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. E.B. Dlamini
(Labour Law Consultant)

For Respondent: Mr. D. Msibi
(Labour Law Consultant)