# IN THE INDUSTRIAL COURT OF SWAZILAND

**HELD AT MBABANE** **CASE NO. 54/2007**

In the matter between:

**SIMANGA NHLABATSI** **APPLICANT**

and

**NISELA FARMS** **RESPONDENT**

**CORAM:**

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| **S. NSIBANDE** | **:** | **PRESIDENT** |
| **MR. ANDREAS NKAMBULE** | **:** | **MEMBER** |
| **MS. PHUMELELE THWALA** | **:** | **MEMBER** |

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| **MR. B. MDLULI** | **:** | **FOR APPLICANT** |
| **MR. K. MOTSA** | **:** | **FOR RESPONDENT** |

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**JUDGEMENT – 31/05/10**

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1. This is an application for the determination of an unresolved dispute between the Applicant Simanga Nhlabatsi and the Respondent Nisela Farms.

2. In his particulars of claim the Applicant seeks payment of his statutory benefits being notice pay, additional notice pay and severance allowance. He also seeks maximum compensation for unfair dismissal. He has not sought reinstatement.

3. Applicant testified in Court that he was employed by the Respondent on 18th April 1999 under an oral contract of employment. He alleges he worked continuously for the Respondent from 18th April 1999 until he was dismissed on 30th August 2006. At the date of his dismissal he was earning a monthly salary of E1017.00 (One Thousand and Seventeen Emalangeni).

4. The Applicant alleges that the termination of his employment was both substantively and procedurally unfair. He testified that his termination came about after he lost a two-way communication radio in a certain motor vehicle which has given him a lift while he was on his way to his duty station. This was on the 29th August 2006.

5. He testified that after realizing that he had lost the radio, he told his colleague, a certain Tsabedze that he must have dropped the radio in the car. He testified that he also reported to his Manager Vusi Matse. The loss of the radio was said to have occurred on 29th August 2006.

6. The Applicant testified that on 30th August 2006 he discovered that Mr. Minnie, the Respondent's Managing Director, had been told about the loss of the radio. Mr. Minnie allegedly called the Applicant, castigated him for the loss of the radio and told him to deliver his uniform and leave the company premises unless he was prepared to withdraw certain charges he had against his fellow employees.

7. The Applicant testified that he handed over the uniforms to Mr. Tsela who then advised him that a letter had been written inviting the

Applicant to a disciplinary enquiry. Applicant refused to take the letter and advised Tsela that Applicant had since been dismissed by Mr. Minnie.

8. The Respondent's defence is that it did not dismiss the Applicant but that he voluntarily left his employment rather than face a disciplinary enquiry into his misconduct. The Respondent's evidence was that the Applicant committed a misconduct by taking a lift to work which misconduct was compounded by the fact that he then lost the Respondent's two-way communication radio which was required for his work. It was the Respondent's evidence that when the Applicant was advised of the intention to charge him for misconduct and told to fetch a letter advising him of the charges he would face, the Applicant chose to abandon his work and refused to receive the said letter.

9. It is common cause that the Applicant took a lift from a vehicle belonging to Mkhaya on his way to work on 29th August 2006. That he lost the two-way communication radio is also common cause.

10. What is in dispute is what occurred on the following day – the 30th August 2006. The parties have given mutually destructive versions of the events of 30th August 2006. The proper cause for the Court to take is to take the Applicant's version and compare it with the Respondent's version and make a finding on the probability of each version having taken into account the credibility of the witnesses for each side and their reliability.

11. The first issue on which the parties differ is whether the Respondent had a rule against its employees taking lifts to work and whether the Applicant was aware of such rule. The Applicant's version was that there was no such rule and that employees could travel to work using any mode of transport available to them. The Respondent pointed out that employees were expected to inspect the perimeter fence and keep a general look out for any mishap within the Respondent's property along the route to work. Troy Minnie added that the rule was meant to help prevent confidential information falling into the wrong hands.

12. We accept that it was likely that security and game ranges were expected to walk between Nisela Farm and Nisela Safaris firstly

because Tsela and Tsabedze's evidence that the Applicant knew of the rule because he had taught new recruits the same rule was not denied. Secondly, the distance between the two places (Nisela Farms and Nisela Safaris) was only 4,8 km. For this reason it is probable in our view that security guards expected to patrol the perimeter fence in the manner explained by the Respondent's witnesses. The evidence led together with exhibit R2, in our view confirms the existence of the no lift rule. It seems to us that the Applicant denied knowledge of the rule in order to put himself at an advantage.

13. The second and most significant issue on which the parties differ is that of the events of 30th August 2006. The Applicant alleges that his shift started from 6pm on 29th August and ended at 6am on the 30th August 2006. It has not been denied that the Applicant's shift ended at 6am on the 30th August 2006. At the end of his shift, Applicant alleges, he walked to Nisela Farms to report to Mr. Troy Minnie about the two-way radio he had lost. He alleges he met Mr. Minnie and it was at this meeting that he was lambasted about the charges he had laid against fellow employees, told that Mr. Minnie was tired of him and then dismissed.

14. The Respondent denies this alleged sequence of events and alleges that the Applicant was called to a meeting early on 30th August 2006 so that his side of the story of the lost radio could be heard. It was the Respondent's evidence that Mr. Minnie, Mr. Tsela and Mr. Tsabedze were present at the meeting with the Applicant and that at the end of that meeting the Applicant was told that he would be charged for the loss of the radio and for taking lift to work and told to return to the office after 8am to collect his charges.

15. Mr. Tsela's evidence was that the usual morning management meeting started at about 4.30 am after which he, together with Tsabedze and Minnie met the Applicant. They estimated that the meeting with Applicant would have been at 5.30 am. Tsela further testified that he asked Tsabedze to call the Applicant so as to verify what Tsabedze had reported about the radio.

16. While Tsabedze confirms that the meeting with Applicant started approximately at 5.30 am he stated that he had arranged for the Applicant to be released early so that he could attend to the meeting

with Tsela and Mr. Minnie. Tsabedze stated that he sent a security guard Mvuselelo Dlamini to relieve Applicant at around 4.00 am.

17. Mr. Minnie's evidence was that he had been told by Mickey Riley of Mkhaya that one of their drivers had picked up a Nisela Security Guard who had subsequently left a two-way radio in the Mkhaya vehicle. He also testified that Tsabedze reported to him in the morning that Applicant had reported losing the radio but had said he lost it running to work.

18. With regard to the events of 30th August Mr. Minnie indicated the meeting between himself, Tsela, Tsabedze and the Applicant took place at about 5.30 am. He testified that he had asked Tsabedze to call the Applicant to find out his version of the manner in which the radio was lost. Minnie's testimony in cross examination was that he instructed Tsabedze to call the Applicant at about 5.15 am and would have seen him with the others about 15 minutes thereafter.

19. Two significant questions arise from the Respondent's evidence. Firstly, if the Applicant was at work from 6.00 pm to 6.00 am, how

could he have been at the meeting at 5.30 am? The explanation by Tsabedze that he was relieved early by another security guard at 4.00 am raises more questions than answers. Both Tsela and Minnie testified that they had directed that Applicant be called into the meeting. They could not have done so before 4.30 am when their meeting started, and before Tsabedze had reported on the radio being lost and also before Minnie, himself told the meeting about the phone call he received from Mr. Riley.

20. The second question arises from the alleged meeting itself. Mr. Minnie's evidence regarding the meeting was that Tsabedze reported on the loss of the radio and said that Applicant had reported that he had lost the radio while running up to Safaris. This evidence was contrary to Tsabedze's evidence. Tsabedze admitted that the Applicant has stated that he had lost the radio in the vehicle belonging to Mkhaya. Why would he then report to the meeting that the radio was lost while Applicant was running to work? Applicant had also been forth right about the circumstances in which the radio was lost and his evidence in this regard was not denied. The version given by Minnie was never put to the Applicant nor was it suggested in

Tsabedze's evidence in chief that he had told Minnie a different version of how Applicant had lost the radio. This piece of evidence begs the question why two people representing the Respondent would give two version of what was reported at the management meeting about the loss of the radio.

21. It appears to us, from the evidence of Minnie that the Applicant was or had become a difficult employee for the Respondent to deal with. According to Minnie the Applicant was found to be charging his subordinates money for infringing company policies and then keeping the money. He had been passed up for promotion as a result. Surprisingly no formal disciplinary steps were taken against Applicant. The Applicant may also have felt he was special to the Respondent. His evidence was that his work related issues were not dealt with by his supervisors but by Mr. Minnie. The fact that he was paid a salary during a period in which he was incarurated for a work related offence may have given the Applicant such feelings. It was also in evidence that he expected some payment from the Respondent for the time he spent in prison, because his imprisonment had arisen from a work related issue.

22. For the above reasons; it seems to us that the Applicant's story is more probable. From his demeanour in giving evidence, his frame of mind was such that it is mostly likely that he approached Mr. Minnie directly to report about the lost radio. More so because it seems he did not expect that he would be disciplined, let alone dismissed. It seems to us that Mr. Minnie saw an opportunity to rid Respondent of the troublesome Applicant as a result of this incident. It seems to us that Applicant had nothing to fear from the charges he would have faced as a result of the loss of the radio. According to the evidence of Tsabedze, had the Applicant been found guilty of contravening the rule regarding the riding of vehicles to work, he would have faced punishment of perhaps having to do 50 push-ups. This was hardly reason to have the Applicant abandon his post. Further even the charge of negligence would not have, in our view, been so serious as to have the Applicant abandon his post because, (a) the radio's whereabouts were know and it could be recovered and (b) the Applicant's disciplinary record was clean – he had no warnings for negligence written or otherwise. It is difficult to see how he could have been dismissed on such charges.

23. It is our finding therefore that the Applicant was dismissed by Mr. Minnie in the circumstances described by the Applicant and that such dismissal, in the absence of a disciplinary enquiry, was substantively and procedurally unfair.

24. Turning to compensation, in our view it was established that the Applicant earned on average E817.25 per month. He then received rations on monthly basis. The rations were received either physically in which case an employee received a food parcel or by cash (E200). Mr. Tsela's evidence was that the employees were entitled to the rations and that it was part and parcel of the salary of the employee. It is our finding therefore that Applicant's salary at the time of his dismissal was E1017.25.

25. Taking into account the Applicant's personal circumstances, that he was employed within 2 months of his dismissal by the Respondent and the fact that he has not sought reinstatement, we consider it fair to award him 6 months salary as compensation for unfair dismissal.

26. Applicant is also entitled to payment of notice pay, additional notice and severance allowance.

27. Judgement is entered against the Respondent for payment to Applicant as follows:

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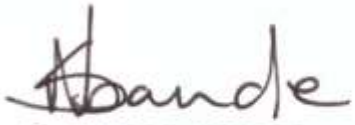
| Notice Pay | E1017.25 |
| Additional Notice | E1109.76 |
| Severance Allowance | E2744.32 |
| Compensation for Unfair Dismissal | E6103.50 |
| **TOTAL** | **E10 974.87** |

The Respondent is to pay the costs of the application.

The Members agree.



**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT**