



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 196/2017

In the matter between:

JACOB SHABANGU

APPLICANT

And

**OK BAZAARS (PTY) LTD t/a OK
FURNITURES**

RESPONDENT

Neutral citation : *Jacob Shabangu v OK Bazaars (Pty) Ltd t/a OK
Furnitures [196/2017] [2018] SZIC 55 (21 June
2018)*

CORAM:

BONGANI S. DLAMINI : ACTING JUDGE

DAN MANGO : MEMBER

NKHOSINGIPHILE DLAMINI : MEMBER

DATE LAST HEARD : 15 JUNE 2018

DATE DELIVERED : 21 JUNE 2018

Summary: Labour Law- Application for determination of unresolved dispute- Employee dismissed for absenteeism after resisting transfer to another branch of the company. Held; The evidence is insufficient to show that the Applicant was absent from work as alleged by employer. Employer has failed to discharge the onus resting on it to show that the termination of Applicant's contract of employment was fair and reasonable in the circumstances of the case-Applicant awarded compensation for unfair dismissal.

JUDGEMENT

Introduction

1.0 The Applicant was employed by the Respondent on the 2nd October 2007 as a Sales Advisor and was earning the sum of E 1,860.00 per month. In addition to the fixed salary of E 1,860.00, the Applicant was entitled to be paid commission based on a formula agreed upon between the parties.

- 2.0 On the 30th March 2016, the Applicant's services were terminated by the Respondent following a finding of guilt on a single charge of absenteeism preferred against the Applicant.
- 3.0 The Applicant reported a dispute of unfair dismissal to the Conciliation Mediation and Arbitration Commission ("CMAC") following his dismissal and the dispute was certified as unresolved after conciliation. The Applicant has approached this Court for a determination of the unresolved dispute.

Brief Facts

- 4.0 In his testimony, the Applicant stated that upon engagement by the Respondent, he was stationed at Manzini 1, which is a branch of the Respondent. The Respondent has several branches in the Kingdom of Eswatini which are spread over in the different parts of the country. The Applicant stated that he was reporting to Miss Philile Dlamini who was the Branch Manager at Manzini 1. The Regional Manager responsible for all the branches in the country was one Mr. Stanley Msweli.

5.0 The Applicant's testimony was that on the 19th October 2015, he was informed by the Regional Manager, Mr. Stanley Msweli, that as from the 22nd October 2015, he was being transferred to the Nhlanguano branch of the Respondent. The Applicant stated that Mr. Msweli communicated the instruction of transfer to him through email.

6.0 In his testimony, the Applicant stated that upon receiving the instruction from the Regional Manager, he then sought to have audience with him, Mr. Msweli who however declined to have a discussion with him on the issue.

7.0 The Applicant elected to write an email to the Regional Manager on the 22nd October 2015 requesting for an audience with him in relation to the transfer. The Regional Manager responded to the Applicant's email and also copied his response to one Mr. Stephen Martin who is the Regional Operations Manager based in Johannesburg, South Africa.

8.0 The Applicant's evidence was that when he responded to Mr. Msweli's email correspondence, he also decided to copy the Regional Operations Manager. In the communication to Mr. Msweli, the

Applicant detailed his reasons why the transfer would be unfair to him. Some of the reasons given by the Applicant in the email communication to Mr. Msweli were that he had school going children who were enrolled in schools around Manzini. These children reside with the Applicant in Manzini and he could not leave them behind as he had separated with his wife. The Applicant also raised issues of travelling costs as well as relocation costs.

9.0 On reading the email communication from the Applicant directed to Mr. Msweli and copied to him, the Regional Operations Manager intervened and directed that the Applicant should not be transferred to Nhlanguano as he (Regional Operations Manager) had not agreed to the transfer. The communication from the Regional Operations Manager also highlighted that if an employee was to be transferred to another branch, such transfer must be within the same area, for instance, if there was a need to transfer the Applicant from the Manzini 1 branch, the Applicant should be transferred to the Manzini 2 branch, which is within the vicinity of Applicant's work station.

10.0 The issue of Applicant's transfer to Nhlangano was thus stopped by the Regional Operations Manager on the basis that he had not agreed to it. On the 19th February 2016, the Applicant was called to the office of Miss Philile Dlamini and was informed by the latter that with immediate effect, the Applicant was expected to report to the Gables branch which is where he had since been transferred to. As a matter of fact, Miss Philile Dlamini informed the Applicant that the transfer to the Gables branch was effective as from the 1st February 2016, even though this message was communicated to the Applicant on the 19th February 2016.

11.0 The Applicant testified that he again wrote another email to the local Regional Manager, Mr. Msweli and protested about the transfer to the Gables branch. Mr. Msweli however insisted that the Applicant was to report to the Gables branch since he (Applicant) was aware of the company policy that prohibited family members from working in the same branch. It was an accepted fact that the Applicant was working with his brother at the Manzini 1 branch and, once this fact came to the attention of the employer, it became necessary that one of them be transferred to another branch.

12.0 During or around the 4th March 2016, the Applicant received a letter informing him that he was being charged for “*unauthorized absenteeism from work since 12/02/2016.*” The letter sent to the Applicant indicated that the disciplinary hearing would be held on the 8th March 2016 at Ezulwini Ok Furniture’s offices at 10:00 am.

13.0 The Applicant’s testimony was that in the entire month of February 2016, he was reporting at Manzini 1 branch and that he never absented himself on any of the days alleged by the Respondent. The evidence by the Applicant was that he did not report to the Gables branch because he had formally challenged his transfer at the Industrial Court under case no.64/2016 and that this matter was still pending in court. The Applicant presented in Court his attendance register which indicate that he was reporting at the Manzini 1 branch for the entire month of February 2016.

14.0 The Applicant did not attend the disciplinary hearing scheduled for the 8th March 2016 and two subsequent dates because his belief was that the matter still pending at the Industrial Court had to be completed first before he could be called to a disciplinary hearing.

- 15.0 On the 29th March 2016, the disciplinary hearing proceeded in the absence of the Applicant and a decision was taken by the Respondent to terminate his services.
- 16.0 On learning of his dismissal, the Applicant decided that it would serve no purpose for him to proceed with the applications filed at the Industrial Court. Not only had the Applicant challenged his transfer at the Industrial Court but another application had been filed by him challenging the short notice given to him to attend the disciplinary hearing. Both applications were not determined by the Court as they became academic on termination of Applicant's employment. In his evidence, the Applicant stated that he believed that his employer would not proceed with the internal disciplinary hearing pending determination of the matters filed by him in Court.
- 17.0 In addressing the charge of absenteeism leveled against him by his employer, the Applicant stated that to demonstrate that he was in attendance at work in all the days of the month, he was paid his full salary for the month of February 2016. In Applicant's testimony, the Respondent only pays a full salary upon satisfying itself, by perusing

the attendance register and the time sheet that an employee was in attendance at work for all the days of the month.

18.0 In conclusion, the Applicant stated that he wished to be compensated for unfair dismissal in accordance with the law. The Applicant has six children and five of these children are still school going. The Applicant is currently unemployed but now and again operates a taxi service in Manzini.

Respondent's Evidence

19.0 The first witness to give testimony on behalf of the Respondent was Miss Philile Dlamini, the Branch Manager of the Respondent at Manzini 1 branch.

20.0 The testimony by Miss Dlamini was that she was transferred to the Manzini 1 branch in September 2015. The Applicant was one of the employees reporting to her when this witness assumed her responsibilities as Branch Manager at the Manzini 1 branch.

21.0 Miss Dlamini's testimony was that on the 12th February 2016, she received an email communication from Natasha Nel who was the

Regional Human Resources Manager based in Johannesburg. The email communication indicated that the Applicant was being transferred to the Gables branch at Ezulwini and effective from the 1st February 2016.

22.0 On receiving the email from Natasha Nel, the witness immediately called the Regional Manager in order to enquire on what she was expected to do because it was already late in the month and the Applicant was going to be disturbed in his duties. The witness suggested to Mr. Msweli that they ought to wait till the 21st February 2016 which is when they close the customer accounts for the month. Mr. Msweli agreed to the proposal by Miss Dlamini and thus Applicant's transfer was to be effective on the 22nd February 2016.

23.0 On the same day of receiving the email from Natasha Nel, namely the 12th February 2016, Miss Dlamini then called the Applicant and a certain Mr. Mahlalela to come to her office whereupon she explained the contents of the email from Natasha Nel to the Applicant. The Applicant however informed the witness that he would not be in a position to transfer to the Gables branch. The Applicant subsequently left Miss Dlamini's office only to come back on a Friday of the same

week to request for a grievance form. The witness informed the Applicant that she was not aware of grievance forms that are being used within the company.

24.0 Later in the same month of February 2016, Miss Dlamini was asked to record a statement regarding her interaction with the Applicant on the issue of his transfer. In the statement, the witness stated that she called the Applicant to her office to inform him about his transfer on the 19th February 2016.

25.0 Miss Dlamini's testimony was further that she last saw the Applicant at the Manzini 1 branch on the 23rd February 2016. The witness stated that as much as she is a Manager who has an office, she regularly moves around the shop floor in order to monitor that everything is in order. The evidence by Miss Dlamini was that if the Applicant was present at work after the 23rd February 2016, she would have been able to see him when she moved around the shop on the remaining days of the month.

26.0 The evidence by Miss Dlamini was that the attendance register filled up by the employees is used in preparing the time sheets which are then used for processing employees' salaries. The witness noted that

as much as the Applicant was paid his full salary for the month of February 2016, this error was subsequently realized and corrected when it was discovered by the company.

27.0 During cross-examination, the witness confirmed that she was not personally involved in the transfer of the Applicant to the Gables branch. The witness also stated that she attended the disciplinary hearing only in one instance and that she could not remember on which date, amongst the three days scheduled for the hearing, she was requested to attend.

28.0 The second witness for the Respondent was one Miss Gugu Maseko. This witness is employed as an Administrator and, in her testimony, works in all the departments of the Respondent. The evidence by Miss Maseko is that she works mainly in the accounts department of the Respondent at Manzini 1 branch.

29.0 The evidence by Miss Maseko was that she is aware of the time sheet document and that it is used for processing the payment of salaries for the employees of the Respondent. The time sheet, according to this witness, is completed using information sourced from the attendance

register which is filled by the individual employees of the Respondent.

30.0 Miss Maseko's evidence was that she is the one who personally filled the time sheet for the Applicant and thereafter took it to the Regional Manager, Mr. Msweli for endorsement. When specifically asked as to when she last saw the Applicant at work by the Respondent's attorney, the witness stated that she last saw the Applicant at work 'at the end of the month'.

31.0 During cross-examination, the witness conceded that she could not confirm whether or not the Applicant was absent from work as at the 25th February 2016 up to month end. The witness also agreed during cross-examination that the attendance register was inconsistent with the time sheet register and that she could not provide an explanation for this discrepancy.

Submissions by the parties and analysis of the evidence

32.0 In discharging the onus resting on it, the Respondent, through its attorney, argued that the evidence led in Court confirmed that the Applicant was indeed absent at work (Manzini 1 branch) from the 23rd

February 2016 up until month end. In his submissions, Mr. Dlamini for the Respondent stated that it is immaterial that the Applicant was alleged to have absented himself from the 12th February 2016 as stated in the charge letter as the evidence showed that he was not at work from the 23rd February 2016.

33.0 In the alternative, Mr. Dlamini's submission was that it cannot be disputed that the Applicant was transferred to the Gables branch, at least from the 22nd February 2016 and that the Applicant never attended at the Gables branch. This, according to Respondent's Counsel, clearly meant the Applicant had absented himself at the Gables branch.

34.0 The Applicant's Counsel on the other hand argued that the Respondent had failed to discharge the onus resting on it which is to prove that the dismissal was fair and reasonable in the circumstances of the case.

35.0 The onus resting on the Respondent was to show, on a balance of probabilities, that Applicant engaged himself in the misconduct

complained of, which is ‘*unauthorized absenteeism from work since 12/02/2016*’.

36.0 In **Kenneth Bhisha v Cargo Carriers Limited Case No.17/2001 (I.C)**, the Court made the following statement of law;

“In terms of Section 42 of the Employment Act 1980 (as amended), the services of an employee shall not be considered as having been fairly terminated unless the employer proves-

- **That the reason for the termination was one permitted by section 36; and**
- **That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.”**

37.0 The Applicant’s testimony was that he was present at work in all the days of the month in February 2016. In support of his testimony, the Applicant produced an attendance register which indicates that he was present at work up to the last day of the relevant month. The Applicant also stated that he was paid his full salary for the month of February 2016 which could not have happened had he been absent as alleged by the Respondent.

38.0 The evidence by the First Respondent's witness, Miss Philile Dlamini was that she last saw the Applicant at work on the 23rd February 2016. This witness qualified her evidence by stating that she would now and again move around the shop floor and that if the Applicant was at work, she would have been able to see him from the 23rd February 2016 up to month end.

39.0 It is not in dispute that the Respondent has put in place mechanisms to regulate the attendance of its employees at work. This system does not involve eye contact or physically observing the presence of employees at the work station. The system designed by the Respondent requires that each employee must register their attendance by endorsing their names on a specially designed document called the 'attendance register'. In the attendance register, the employee is required to fill in his or her name, the time for reporting to work which must be signed off by that employee as well as the time for leaving work which must also be signed off by that employee on each particular day.

40.0 The attendance register is verified by means of another document designed by the Respondent called the 'time sheet register'. The information contained in the time sheet register is sourced from the

attendance register, with the exception that the time sheet register is prepared and endorsed by another officer higher in rank to the employee completing the attendance register.

41.0 In Applicant's case, the person who filled in the time sheet register for the month of February 2016 was the Second witness called in to testify on behalf of the Respondent, Miss Gugu Maseko. What came out clearly from Gugu Maseko's evidence was that she could not confirm whether or not the Applicant was absent at work from the 25th February 2016 as reflected in the time sheet register. In the contrary, this witness testified that she last saw the Applicant 'at the end of the month.'

42.0 A question then arises as to how Gugu Maseko could mark the Applicant as being absent from the 25th February 2016 as reflected in the time sheet register, when in her own testimony, she did not have any knowledge about the Applicant's attendance from the 25th February 2016. Clearly the person who marked the Applicant as absent from the 25th February 2016 up to month end was neither Gugu

Maseko nor Philile Dlamini, if the evidence of these two witnesses is to be taken for what it is.

43.0 The Respondent's evidence on the issue of the Applicant's alleged absence from work on the 25th February 2016 till the end of the month at the Manzini 1 branch as reflected in the time sheet register falls far too short of the required standard and cannot be accepted as true and correct.

44.0 We also note that the specific charge of absenteeism preferred against the Applicant is that the latter was alleged to have been absent from work as at the 12th February 2016 and not from the 25th February 2016 as reflected in the time sheet register. This is an anomaly which in law cannot simply be brushed aside. The Applicant was entitled to know with precision the case he had to answer and this required that he should have been informed about the precise dates on which he was alleged to have been absent from work.

45.0 When the Respondent charged the Applicant on the 4th March 2016, it had all the facts at its disposal and as such, it is a mystery on why it

would allege that the Applicant was absent from work as at the 12th February 2016. In applying a simple test to the facts of this matter, all that the Applicant had to show was that he was present at work from the 12th February 2016 in contrast to the allegations made against him by his employer. The Respondent's evidence presented through Philile Dlamini, was that the Applicant was allowed to remain at the Manzini 1 branch for at least up to the 22nd February 2016 and thus the Applicant could not have been absent at work from the 12th February 2016 as stated in the letter setting out the charge against him.

46.0 An alternative argument advanced on behalf of the Respondent was to the effect that the mere failure of the Applicant to report at the Gables branch after being transferred to that area from the Manzini 1 branch amounted to absenteeism because as far as the employer was concerned, the Applicant was expected to be present at the Gables branch but failed to present himself at that branch. This kind of conduct by the Applicant, amounted to absenteeism according to the submissions made by the Respondent's Counsel.

47.0 The alternative argument by Respondent's Counsel fails to take into account the fact the two witnesses brought in to give testimony on behalf of the Respondent only testified about the alleged absence of the Applicant at the Manzini 1 branch and not his alleged absence at the Gables branch. There was no evidence whatsoever presented during the trial in which the Respondent sought to prove that the Applicant was absent at the Gables branch and that his alleged misconduct was on account of his failure to present himself at the Gables branch. The attendance register, time sheet register and all the witnesses testified about the Applicant's absence at the Manzini 1 branch of the Respondent.

48.0 Accordingly, in order for the Court to consider the alternative argument advanced on behalf of the Respondent in relation to the alleged absence of the Applicant at the Gables branch, there should have been evidence presented during the trial to support the submissions made by Respondent's Counsel.

49.0 We may add that even if there was evidence in support of the alleged absence of the Applicant at the Gables branch, such evidence would,

in our view, not have advanced the Respondent's case in any significant way in that at all material times, the Respondent was aware that the Applicant was still reporting at the Manzini 1 branch even though he had been transferred to the Gables branch. A competent charge in our view would have been that of 'insubordination' or 'failure to comply with the employer's lawful instructions' as opposed to the charge of absenteeism.

50.0 The Applicant did not just fold his arms and do nothing about his transfer to the Gables branch. The evidence led showed that immediately on being transferred to the Gables branch, the Applicant launched an application to challenge his transfer under Industrial Court Case No.64/2016. When cross-examined by the Respondent's Attorney on why he did not prosecute his application to finalization, the Applicant's response was that the matter was postponed on a number of occasions for reasons unknown to him. The Applicant recalled that on one occasion, the matter was postponed because the Respondent's Attorney had asked for such a postponement because he was bereaved. The Applicant only abandoned his application to

interdict his transfer to the Gables branch after learning that his services had been terminated by the Respondent.

51.0 We now turn to consider the issue of consultation which by law ought to have taken place prior to effecting the decision to transfer the Applicant to the Gables branch. It is not in dispute that the issue of transfer of employees to another area forms part of management's prerogative. In Applicant's case, it is specifically provided for in the contract of employment that;

“13.1 You are employed by the company as a whole and therefore may be required to accept a transfer to another branch within the company. The company will incur various costs in assisting you to transfer from one establishment to another.

13.2 If you terminate your employment for any reason whatsoever within a period of 24 months from the date of transfer, you will be liable for all the costs paid by the company in terms of the clause immediately above.

13.3 You confirm and agree that any such costs incurred by the company may be deducted from any monies owed to you by the company on termination of your employment.”

52.0 In addressing the subject of transfer at the work place, **Grogan J, Workplace Law (9th Ed)** at p. 276 states;

“Although transfers are not dealt with expressly in the LRA, in one case a CCMA Commissioner held that the dismissal of employees for refusing to accept a transfer was procedurally unfair because the employees had not been consulted before the decision was made to transfer them. The Commissioner’s decision was upheld by the Labour Court [*in Gray Security Services (Western Cape) (Pty) Ltd v Cloete N.O & Another (2000) 21 ILJ 940 (LC)*]. However a Court will not interfere with a decision to transfer an employee where the employer is contractually entitled to do so and where the decision is taken for sound operational reasons.”

53.0 We have no doubt that the decision to transfer the Applicant to the Gables branch was for sound operational reasons and was in line with the Respondent’s internal policies. However it is the manner in which the transfer of the Applicant was implemented that presents a problem for the Respondent. The manner in which the Respondent carried out the Applicant’s transfer to the Gables branch was as though the

Respondent was ‘transporting cargo’ to the Gables branch and not a human being who had rendered diligent service to it for many years. This we say because the information relayed to the Applicant either on the 12th or the 19th February 2016 in relation to the transfer was that the transfer was effective from the 1st February 2016. This was not only unfair but also unreasonable in whatever angle one may look at it.

54.0 In communicating the decision transferring Applicant to the Gables, the Respondent did not state in what manner the Applicant would be assisted on various issues including but not limited to issues of daily travelling costs, costs of relocation and the Applicant’s family welfare, in particular the minor children attending school in Manzini as contained in the written contract of employment between the parties. Even when the Applicant raised all of these concerns in writing, there was no response from the Respondent’s management. Accordingly, the Applicant’s transfer to the Gables branch was procedurally defective, unfair and unreasonable for want of proper consultation.

55.0 We therefore conclude without hesitation that the termination of Applicant's services was unfair and unreasonable in the circumstances and that he must be compensated accordingly.

Costs

56.0 In employment disputes, the Court will not readily grant costs against any of the parties involved in the dispute. We note in this case that not only did the Applicant suffer prejudice in terms of losing his permanent job which provided him with income at the end of each month, but that the Applicant also lost the commission which he was earning on top of the fixed salary. In the month of February 2016 for instance, the Applicant earned a commission of E 4,672.00 on top of the fixed monthly salary of E 1,860.00. On his termination, all these benefits went down the drain and the Applicant was left 'high and dry'.

57.0 We conclude that this is a proper case warranting that costs be awarded in favour of the Applicant given the circumstances of the case.

The court accordingly orders the Respondent to compensate the Applicant as follows;

- a) Notice pay in the sum of E 1,860.00**
- b) Additional Notice pay in the sum of E 2,003.08**
- c) Severance pay in the sum of E 5,007.69**
- d) Leave pay in the sum of E 1,645.38**
- e) 10 months compensation in the sum of E 18,600.00**
- f) The Respondent is ordered to pay costs of the application.**

The Respondent is to comply with this judgement within 30 days from the date of issue.

The members agree.


BONGANI S. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant:

*Mr. S. Simelane (Simelane Mtshali
Attorneys)*

For Respondent:

*Mr. S. Dlamini (Magagula & Hlophe
Attorneys)*