



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 547/10

In the matter between:

MANDLA J SIBANDZE

Applicant

and

MUNICIPAL COUNCIL OF MANZINI

Respondent

Neutral citation: *Mandla J. Sibandze v Municipal Council of Manzini (547/10)[2014] SZIC 27 (JUNE 18 2014)*

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

Heard: **02 JULY 2014**

Delivered: **18 JULY 2014**

Summary : *Labour Law--- unfair labour practice--- employer failing to institute disciplinary action within a reasonable time---failure to institute disciplinary action for a period of more than seven months found to be unreasonable in the*

circumstances of the case and amounting to unfair labour practice---Dismissal of the Applicant accordingly found to be unfair.

JUDGMENT

1. This is an application for determination of an unresolved dispute, brought by the Applicant against the Respondent in terms of section 85 (2) of the Industrial Relations Act No.1 of 2000 (as amended).
2. The Applicant is an adult Swazi male person of KaKhoza in the Manzini Region. He is a former employee of the Respondent. He was employed by the Respondent on 3rd September 1992, and was in continuous employment until the termination of his service by the Respondent on 18th June 2010.
3. The Respondent is a municipal authority for Manzini City, duly established in terms of Section 4 of the Urban Government Act No.8 of 1969.
4. The Applicant claims that he was unfairly terminated by the Respondent. The Respondent denies that the Applicant was unfairly terminated. The Respondent stated in its Reply that the termination of the Applicant's contract of employment was substantively and procedurally fair.

5. The Applicant in his amended statement of claim stated the following as the reasons for claiming that his termination was unfair;

5.1 The charges against Applicant were made up and they were not proved at trial.

5.2 The charges against Applicant were preferred a year later after the date on which it is alleged the offences occurred.

5.3 The Applicant was denied his right to be represented until the hearing was concluded.

5.4 The hearing was completed in the absence of the Applicant.

5.5 The charges were brought against Applicant as revenge for exercising his right to seek the protection of the law against an abusive superior.

6. In its reply to the Applicant's application, the Respondent stated as follows:-

“6.1 The Respondent avers that the Applicant is not entitled to the claim for terminal benefits because the termination of his contract was in terms of section 36 of the Employment Act No.5 of 1980.

6.2 It is submitted that the termination of Applicant's contract of employment was substantively and procedurally fair;

6.2.1 In that it was based on a valid reason. The Applicant was charged with acts of misconduct as stipulated in section iii paragraph 3(1) (6) and (0) of the Manzini Council Standing Orders for Employees of 1984 being:

- (a) Insubordination
- (b) Violence and threats of violence towards his immediate supervisor.

6.2.2 Furthermore, the termination was procedurally fair as it was effected in accordance with a disciplinary process in terms of which Applicant was afforded a hearing which was fairly conducted and the decision to dismiss the Applicant was reached after due consideration of all the facts and evidence adduced during the hearing. The dismissal was in terms of Section III Paragraph 7 (1) (f) of the Manzini Council Standing Orders for Employees of 1984. A copy of the decision is annexed hereto marked **“MCM1”**.

6.2.3 In exercise of his rights as spelt out in Section III Paragraph (9)(1) of the Manzini Council Standing Orders For Employees of 1984, Applicant appealed to the Town Clerk but his appeal was

dismissed. A copy of the decision is annexed hereto and marked ‘MCM2’.”

7. The evidence led before the Court revealed that the Applicant was employed by the Respondent on 03rd September 1992. He told the Court that he was employed by the Respondent as an assistant plumber. This was however denied by the Respondent. Indeed the evidence before the Court revealed that the Applicant was employed as a labourer. The Respondent’s witness RW1, Phila Malaza, told the Court that as a labourer, the Applicant would be deployed to any Department where his services were needed. RW1 told the Court that, accordingly, the Applicant was indeed at some point deployed to work with the plumbers, but he was never employed by the Respondent as an assistant plumber.
8. The evidence also showed that there was bad blood between the Applicant and Phila Malaza. The source of this was not quite clear from the evidence before the Court. The evidence revealed that at some point, during 2010, the Applicant reported a case of harassment against Phila Malaza to the police. This matter was referred to the Manzini Magistrate’s Court where a peace binding order was made against Phila Malaza by former Manzini Magistrate, Fikile Nhlabatsi.
9. During the subsistence of the peace binding order, another incidence occurred at the Respondent’s workplace involving the Applicant and Phila Malaza. The Applicant was knocked by the Respondent’s motor vehicle which was being driven by Phila Malaza. Phila Malaza told

the Court that this was a mistake, and that he knocked the Applicant by mistake whilst reversing the motor vehicle during the morning hours. The Applicant was not seriously injured. The Applicant reported the matter to the Magistrates' Court as there was a peace binding order in operation between the parties. The Magistrate found that Phila Malaza had breached the peace binding order and sentenced him to pay a fine of E1000.00 or ten months imprisonment in default. The sentence was wholly suspended for a period of three years.

10. Phila Malaza is still under the employment of the Respondent. He is employed as a Works Foreman. His duties involves allocating duties or tasks to his subordinates, makes daily reports and compiles them for making monthly reports and also takes part in the recruitment of labourers and artisans. He reports to the Maintenance Superintendent. Below him are artisans, bricklayers, plumbers and painters. On a daily basis he allocates duties to his subordinates at the workshop at 07.00 am. He would thereafter make inspections at the sites where the various crews are working to see if the work is being carried out as per instructions. In charge of the working crews at the sites were the artisans.

11. On the day of the incident that led to the dismissal of the Applicant the labourers, as usual, loaded onto the Respondent's truck the materials that they were going to use at the various sites. The Applicant and his crew members were going to construct a pavement next to St Theresa's School, along Tenbergen Street. The Applicant did not board the Respondent's truck, but travelled on foot as he

wanted to go via Manzini Market to collect his working tools. Among the materials that were loaded onto the truck were bags of cement. Some of the bags of cement were supposed to be offloaded at the site where the Applicant was going to work, along Tenbergen Street. The artisan in charge for the crew that was to work at that site was Godfrey Mabuza. Godfrey Mabuza however remained behind as he wanted to arrange for provision of the water to be used at the site as the water tanker was out of service. Phila Malaza organized another water tanker which he pulled with the motor vehicle that he was driving. Phila Malaza travelled to the site together with Godfrey Mabuza.

12. On arrival at the site the other workers told Phila Malaza that the Applicant was refusing to help offload the cement bags that were to be used there. The Applicant was sitting on his spade across the road under a tree. Phila Malaza then instructed the Applicant to help offload the cement bags. The Applicant did not take kindly to this instruction and he stood up and confronted Phila Malaza, pointing a finger at him and also raising the spade. One of the employees, Mfanizile Dlamini, who was also a shop steward, alighted from the truck and intervened. Phila Malaza then drove back to work to report the incident. No disciplinary steps were immediately taken against the Applicant. The Applicant was eventually charged for that misconduct on 30th April 2010.

13. ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:

The Applicant in his evidence in chief told the court that he found the other employees having already offloaded the cement from the truck, and that the truck had already left. He said he was sitting down because there was nothing else to do at that time as they were waiting for the water. He denied that he defied Phila Malaza's instruction. He also denied that he threatened to assault Phila Malaza. The Applicant told the court that his relationship with Phila Malaza was not good. He told the court that it started in 2007 when Phila Malaza was on leave. During that period the Respondent's engineers granted the Applicant permission to work with the plumbers in the Plumbing Department. The Applicant worked in the Plumbing Department until 2009 when Phila Malaza recalled him and brought him back to the Building Department. The Applicant did not like this and reported the matter to the Conciliation, Mediation and Arbitration Commission ('CMAC'). CMAC ruled that the Applicant be returned to the Plumbing Department so that he could also undertake a grade test at the Swaziland College of Technology ('SCOT').

14. From the evidence before the court, the court will accept the evidence of the Respondents' witnesses and find that it proved on a balance of probabilities that:

- 14.1 The Applicant was found by Phila Malaza and Godfrey Mabuza sitting down.

14.2 That he was instructed by Phila Malaza to help his colleagues to offload the bags of cement from the Respondent's truck.

14.3 The Applicant refused to heed that instruction and accosted Phila Malaza.

15. The evidence before the Court revealed that the immediate supervisor of the Applicant was Godfrey Mabuza. There was no evidence before the court that Godfrey Mabuza did give an instruction to the Applicant on that day. It is only when the immediate supervisor Godfrey Mabuza is not present at the site that the next officer in terms of the hierarchy can issue an instruction to the labourers at the site. It is also worth noting that Godfrey Mabuza did not testify during the disciplinary hearing of the Applicant. He also did not testify in Court. The only logical conclusion that the court can arrive at is that the Respondent realized that the Applicant was supposed to take instructions from Godfrey Mabuza his immediate supervisor. It was therefore unfair to dismiss the Applicant for insubordination in the circumstances of this case. There was no evidence led in court to explain as to why was it necessary for the foreman to issue the instruction to the Applicant when his supervisor Godfrey Mabuza was present.

16. The evidence by the Respondent's witnesses was that the Applicant threatened to hit Phila Malaza with the shovel. There is no doubt to the Court that if that is what happened, it was clearly a very serious

matter. The Court will not countenance any form of violence at the workplace. Indeed the evidence revealed that Phila Malaza left immediately and went to report the incident to his superiors. Normally, one would expect that swift disciplinary action would be taken by the employer. The seriousness of the incident was however downplayed by the attitude of the Respondent. The Respondent failed to take any action against the Applicant soon after the incident was reported. If the incident was as serious as the Respondent's witnesses wanted the court to believe, it is not clear why the Respondent did not take disciplinary action immediately. The incident took place in the morning hours at about 08:15 a.m. on 08th September 2009. The Respondent did not take any disciplinary action for seven months. The delay was clearly unreasonable. There was no explanation to the court as to why the Respondent delayed in taking disciplinary action against the Applicant until 30th April, 2010 when it preferred the charges against him.

17. The conduct of the Respondent of failing to take disciplinary actions against the Applicant immediately or within a reasonable period shows that the Respondent either condoned the incident or did not form the view that it warranted disciplinary action being taken against the Applicant. To resuscitate issues that took place seven months ago was clearly an unfair labour practice. The dismissal of the Applicant was therefore unfair.

18. Good industrial relations at the workplace demand that disciplinary action against any offending employee should be taken swiftly. It is unfair labour practice for an employer not to take disciplinary action immediately but decide to save it for an “opportune” time in the future. Disciplinary hearing must be timeous, that is, it must be convened as soon as possible after the incident which led to the disciplinary action.

(see: John Grogan: “Workplace Law” eight edition p.193)

In the present case, there being no explanation for the delay, the period of seven months and twenty two days was clearly unreasonable.

19. The record of the disciplinary hearing shows that Phila Malaza also reported the incident to the police station. The Applicant was called to appear at the police station where the Applicant apologized to Phila Malaza. This could be one of the factors that may have influenced the Respondent against instituting disciplinary action against the Applicant.

20. The evidence also revealed that in 2010 the Applicant obtained a peace binding order against Phila Malaza. Whilst the peace binding order was still operative against Phila Malaza the evidence showed that one morning Phila Malaza knocked the Applicant with the company motor vehicle at the workplace whilst he was reversing. The

Applicant reported the matter to the Magistrate who had issued the peace binding order. Phila Malaza was found to be in breach of the peace binding order and was sentenced to pay a fine of E1000.00 or in default thereof, ten months; imprisonment. The sentence was wholly suspended for three years.

21. With this suspended sentence hanging over the head of Phila Malaza, the Applicant was removed from the Works Section and was instructed not to carry out any work but to remain within the workshop. This instruction was issued by the Assistant City Engineer, Mr E.P. Mkhweli on 23rd February 2010. The letter written to the Applicant. Reads in part as follows:

“ Subject: Removal from Work Section

You are hereby instructed to stop working for Works Section following the ruling of the Magistrate on your case against Phila Malaza, your Supervisor, that you should have no contact with Phila Malaza failing which Phila Malaza will be liable to a jail term of 10 months or a fine of E1, 000.

You are to report at work as usual but you shall remain within the Workshop premises from 07:00HR TO 10:00HR, 10:30HR to 13:00HR and 14:00HR to 1645HR. You are to seek permission from me (Assistant City Engineer) should you wish to leave the premises during the above mentioned times.

This comes into effect from 23rd February 2010 until further notice. Your co-operation in this matter will be highly appreciated.

E.P. Mkhweli”

22. From the evidence before the Court, there was no other act of misconduct that the Applicant committed in 2009 up to 30th April 2010 when he was charged with acts of misconduct that took place during the previous year in 2009. In view of the above letter in terms of which the Applicant was banned from having contact with Phila Malaza because he had obtained a peace binding order against him, it seems that the Respondent was keen on removing the Applicant from the establishment in order to protect its senior employee, Phila Malaza. This was evident from the fact that the Respondent in count 1.1.1 charged the Applicant for another act of insubordination allegedly committed on 22nd June 2009.

23. The picture that emerges from the evidence before the Court is that;

23.1 On 22nd June 2009 the Applicant was accused of having committed an act of insubordination against Phila Malaza, but no disciplinary action against the Applicant was taken by the Respondent.

23.2 Again, on 08th September 2009 the Applicant was accused of a similar offence but no disciplinary action was taken soon thereafter.

24. The Applicant was found not guilty on count 1.1.1 relating to the alleged act of insubordination committed on 22nd June 2009. The chairperson of the disciplinary hearing was also disturbed by the lackadaisical attitude of the Respondent. He remarked as follows when making his finding:

“The incident happened on 22nd June 09 and it does not seem to have been pursued until 30th April 2010, when Mr Sibandze was notified of the disciplinary hearing against him”.

25. From 08th September 2009 when the incident took place at about 08:15 a.m, the Applicant was allowed, and was indeed able to carry on with his duties as normal. The evidence was clear that the Applicant had problems with only one person at the workplace, that is, Phila Malaza. Phila Malaza however is very senior to the Applicant who is merely a labourer. The Applicant’s immediate supervisors are the artisans who in turn report to Phila Malaza, the Works Foreman. If the hierarchy and lines of reporting are respected, the two cannot cross each other’s path.

26. There was no evidence before the court that Applicant’s position no longer exists at the workplace. Further, even if for any reason, the Applicant and Phila Malaza do have misunderstanding again, there is

no longer any jail threat on Phila Malaza, the three years suspended sentence having now expired.

27. Taking all the evidence before the court, the circumstances of the case, the court will make the following order:

- a) The dismissal of the Applicant was substantively and procedurally unfair.
- b) The Respondent is to re-instate the Applicant with immediate effect.
- c) The Respondent is to pay the cost of suit.

28. The members agree.

NKOSINATHI NKONYANE
JUDGE: INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT:

MR L. MALINGA
(MALINGA & MALINGA INC.)

FOR RESPONDENT:

MR S. PHIRI
(THWALA ATTORNEYS)

