



## IN THE INDUSTRIAL COURT OF SWAZILAND

### JUDGEMENT

CASE NO. 37/2003

In the matter between:-

**KENNETH NGWENYA**

**APPLICANT**

AND

**EAGLES NEST (PTY) LTD**

**RESPONDENT**

**Neutral citation:** *Kenneth Ngwenya v Eagles Nest (Pty) Ltd (37/2003) [2015] SZIC 04 (03 February 2016)*

**CORAM** : **DLAMINI J,**  
*(Sitting with D. Nhlengetfwa & P. Mamba  
Nominated Members of the Court)*

**Delivered** : **03 FEBRUARY 2016**

**Summary:** *Labour Law - Unfair Dismissal – Applicant alleges unfair dismissal by Respondent after being exonerated by a disciplinary enquiry. Held – All cases of alleged unfair dismissal are assessed on the basis of two criteria; substantive and procedural fairness. Held – When an Employer rejects the recommendation of a disciplinary enquiry it must set forth findings of fact supported by substantial evidence in the record that support its conclusions and ultimate decision. Held – Dismissal of Applicant procedurally unfair but substantively fair.*

1. On 26 October 2001 there was trouble at Eagles Nest (Pty) Ltd, the Respondent in these proceedings, in Malkerns. Employees of the Company apparently engaged in an unlawful strike action and the Kenneth Ngwenya, the Applicant in these proceedings, was identified as one of the ring leaders of this unlawful industrial action. Ngwenya was taken through a disciplinary hearing chaired by an independent Chairperson, who, at the conclusion of same returned a verdict of not guilty and further recommended that he be reinstated to his position. However, such recommendation was rejected by the Employer. The Employer instead terminated the services of the Applicant, hence now these present proceedings before this Court for determination.
  
2. The case of the Applicant can be summarised as follows; he was employed by the Respondent on 22 September, 2000, as a Storeman, with a monthly salary of E432.00. He went on to testify that in September 2001, after completing a year of continuous service with the Respondent he went on leave and that it was on his return from his leave that trouble started. Apparently whilst away on leave there was what he called a 'misunderstanding' between management and some of employees who were discovered to have stolen eggs. As a result of this discovery, management of

the company decided to withdraw the transport benefit of the Employees. Ngwenya further testified that he, together with the other Employees then negotiated with management but interestingly he was then accused of threatening the company's customers and had criminal charges laid against him.

3. He underwent a criminal trial at the Swazi National Court and he was acquitted. On his return to work he was suspended without pay for 21 days. When he resumed his duties after the suspension he was then slapped with 3 charges. A disciplinary hearing was convened and same was chaired by a certain Rudolph Matsenjwa. At the conclusion of the hearing the Chairperson found him not guilty on all 3 charges and further made a recommendation that he be reinstated to his position. But that was not to be as the Employer, Derick Chester, rejected the recommendation and instead terminated his services. He emphasised that as far as he was concerned there was never a strike at Eagles Nest on the day in question. At his disciplinary hearing he was represented by his current representative, Mr. Ndlangamandla. He stated as well that during his disciplinary hearing no witnesses were called to testify either against or for him.

4. Ngwenya complains that he was never afforded an opportunity to appeal the decision to dismiss him. He also wants to be paid for the 21 days he was under suspension together with notice pay and maximum compensation for the unfair termination of his services.
  
5. Under cross examination by the Respondent's Attorney, Mr. D. Jele, the Applicant was asked as to what he understood a strike to be, and he defined it to be the laying down of work tools and demonstrating against the Employer in the form of '*toyi-toying*'. He denied that he together with the other employees were outside of the company gate. He denied as well that there was an illegal work stoppage on his part. Instead he testified that there could have been a delay of between 5 to 10 minutes in him and the other employees getting to their work stations to start work for the day. He also denied having blocked a tractor from entering the premises to collect manure. Again he denied having threatened other employees with physical assault if they dared entered the company premises to start work for the day. He also denied having blocked three senior employees from entering the premises. When asked as to the reason for his failure to lodge an appeal his response was he did not see the need to since as far as he was aware there

was nobody above the Managing Director he could appeal to. That was the Applicant's case.

6. The first witness to be called in support of the Respondent's case was Vusi Khumalo. He testified under oath that he was employed by the Respondent in 1994 and was now a senior Supervisor at the undertaking. He further testified that on the day preceding the day of the illegal work stoppage, Derrick Chester had searched the truck that transported them to their residences and discovered that some of the employees had stolen eggs. He then withdrew the transport benefit because of the theft and also dismissed those found to have stolen the eggs. Then on the morning 26 October 2001, the Applicant and one Vusi Dlamini closed the main gate just before the other employees could enter to start the day's work. In closing the gate they said no one would be allowed to enter the premises until grievances they had with management were addressed. They threatened anyone who dared try to enter the premises with violence. However some of the employees were already inside the premises when the gate was closed.
7. Vusi Khumalo further testified that at around the same time the gate was closed, a tractor from Malandela came to the premises to collect manure but

it was also not allowed to the premises by the Applicant and the said Vusi Dlamini. They said the tractor from Malandela was responsible for the dismissal of a certain Jabulani Maseko who had stolen a tray of eggs and hidden them in the tractor only for it to be discovered when the manure was off loaded at Malandela. The Applicant and his Vusi Dlamini outlined four grievances which they said they wanted deliberated before work could commence on the day. These were a) the issue of new management employees not being introduced, b) that employees did not know their supervisors, c) the withdrawal of the transport benefit and d) the issue of the employees dismissed for the theft of eggs. According to Khumalo, this illegal work stoppage lasted for over 30 minutes. In fact it was only after Derrick Chester had spoken to the Applicant and Vusi Dlamini that they finally relented and the gate was finally opened and employees allowed into the premises.

8. Khumalo also testified that initially he was called to testify at the disciplinary hearing of the Applicant and Vusi Dlamini but he declined to so testify because he feared for his life as the two were known to be violent characters. Under cross examination by the Applicant's representative, Mr. Ndlangamandla, he maintained his evidence and chief and further testified

that the tractor driver was threatened with assault and turned back with the tractor without collecting the manure. He also stated that the Applicant had threatened everyone to the extent that he was even prepared to die in seeing to it that no one entered the premises that morning.

9. The next employee to testify in support of the Respondent's case was Busisiwe Sidu. She testified about the tray of eggs discovered at Malandela, the arrest of Jabulani Maseko, the search of all employees when they knocked off and were being transported in the company truck and discovery of stolen eggs on some of the employees and subsequent withdrawal of the transport benefit by Chester. She also testified on the events of 26 October 2001, when the Applicant and Vusi Dlamini closed the company gate saying no one would be allowed into the premises until grievances they had were deliberated. They threatened the employees with assault if they dared tried to enter the premises. The employees were scared of the two, especially Vusi Dlamini who was known to be residing at the notorious Mbhuleni location in Matsapha. According to Sidu, she and the other employees were therefore forced to stand outside the premises because of the threats by the two.
10. She also testified that three management employees were also turned back by the Applicant and his partner. These were Erick Smith, Simon Kuss and

Fitzpatrick. They were saying they only wanted Derick Chester to address the employees on the grievances they had. It was only after Chester had arrived and undertook to address the employees that the Applicant and Vusi Dlamini then opened the gate and employees were able to enter the premises. Under cross examination Ndlangamandla disputed that the Applicant had threatened the employees. He suggested to this witness that there was no reason for him to do so because the issues complained of occurred when he was absent but witness Sidu maintained her evidence in chief on the threats.

11. The last witness to testify in support of the Respondent's case was Vusi Zwane. Like the other two witnesses, he too confirmed that the Applicant and Vusi Dlamini closed the company gate telling the employees that no one would be allowed into the premises until some grievances were addressed. They threatened anyone who tried to defy them with physical harm. He also testified on the withdrawal of the transport benefit after the discovery of stolen eggs at Malandela and on some of the employees in the truck transporting them to their residences. He also testified on the Malandela tractor that was blocked at the at the company gate by the two, as a result of which it had to turn back without collecting the manure it had come for. He also mentioned the three management employees who were also denied



entrance into the premises by the Applicant and his colleague Vusi Dlamini. It was only after the arrival of Derick Chester and after he (Chester) had undertaken to address the employees that the Applicant and Vusi Dlamini then opened the gate. By then more than 30 minutes had elapsed. Witness Vusi Zwane also testified on the warning letters given to all the employees who had been outside the premises when the gate was closed by the Applicant and his partner. He mentioned as well that the Applicant and Vusi Dlamini were also given the warning letters but they refused to accept them. He clarified that it was not his intention to be engage in an illegal work stoppage, pointing out that he and the other employees were coerced by the threats of physical harm by the Applicant and his partner. That was the Respondent's case.

12. The case of the Applicant is that his dismissal was procedurally and substantively unfair. He relies heavily on the fact the Chairperson of the Disciplinary hearing exonerated him and therefore does not understand how the decision to ultimately dismiss him was arrived at. The Respondent's case on the other hand is that the Applicant was dismissed for having participated in an illegal strike, inciting employees through violence to participate in the illegal strike and threatening a customer of the Respondent. The Respondent

in essence pleaded that in terms of section 36(b) of the Employment Act 1980 it was fair and reasonable, in the circumstances, to terminate the services of the Applicant.

13. As a starting point, the Court points out that a trial before this Court is a hearing *de novo*. This in essence means that the Court has to conduct its own enquiry into the fairness of the dismissal of the Applicant. This exercise entails considering and determining whether it was reasonable and fair for the Respondent to terminate the services of the Applicant, taking into account all relevant circumstances of the case. All cases of alleged unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. No dismissal will ever be deemed fair if it cannot be proved by the Employer, that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness]. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for instituting the disciplinary hearing against the Employee and ultimately terminating his services. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. So that if an Employer cannot prove that the probabilities of the employee being guilty are greater

than the probability that the Employee is not guilty, the dismissal will be deemed to have been substantively unfair.

14. The evidence before this Court indeed indicates that there was a work stoppage at the Respondent's undertaking on 26 October 2001. This illegal work stoppage was at the behest of the Applicant and Vusi Dlamini. It is therefore a finding of the Court that there was an illegal strike action at Eagles Nest (Pty) Ltd on the day in question. The Court further finds that the Applicant and Vusi Dlamini closed the entrance to the premises and further threatened the employees who wanted to access the premises with physical harm/assault should they defy them by entering the premises. Not only did the Applicant and Vusi Dlamini threaten the employees of the Respondent, they also threatened and denied entry to a customer of the Respondent, the tractor driver who had come to collect manure. To make matters worse for the Applicant's case, the evidence before this Court indicates that they also denied entry to three management employees of the Respondent. This is a clear indication that they were law unto themselves on the day in question. They had no regard even for management employees.

15. As pointed out above, the requirement of our law is that that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. In *casu* therefore, the finding of this Court is that the Respondent, Eagles Nest (Pty) Ltd has proved on a balance of probabilities that the Applicant, Kenneth Ngwenya, committed an act of serious misconduct so severe as to warrant his dismissal. In other words, the finding of the Court is that the dismissal of Kenneth Ngwenya was substantively fair. Indeed violence, threats of violence and ill-treatment of fellow employees is strictly prohibited by our Employment Act. And such acts can never be countenanced by this Court. The Employment Act provides under section 36(b) that it shall be fair for an employer to terminate the services of an employee if that employee is guilty of violence, threats or ill-treatment towards the employer or other employee of the undertaking.
16. There is then the procedural enquiry that has to be undertaken by this Court. The complaint of the Applicant is that despite being exonerated by the Chairperson of his disciplinary hearing, the respondent went ahead and terminated his services anyway. In this regard, the Court points out when the Employer rejects the recommendation of the Chairperson of the disciplinary hearing, the review by a Court of such a decision is limited to whether it is

supported by substantial evidence. This essentially means that the Employer must set forth in its decision ‘findings of fact based on competent proof contained in the record and employ those findings to arrive at conclusions that are supported by substantial evidence’. The Employer must specify what evidence supports its conclusions and ultimate decision. (See *Raucshmeier v Village of Johnson City, 2012 NY Slip Op 00158 Appellate Division, Third Department.*) Not only that, but the Employee must be allowed an opportunity to make representations on the decision rejecting the Chairperson’s recommendation. (See *Telkom SA v CCMA & Others (2002) 23 ILJ (LC).*)

17. Now in this matter, the question to be asked is whether the rejection of the recommendation by the Chairperson and the ultimate decision of the Employer substituting that of the independent Chairperson with the harsher sanction of dismissal was supported by substantial evidence? A reading of the letter written by the Managing Director, Derick Chester rejecting the Chairperson’s recommendation clearly indicates that it was not supported by substantial evidence. Derick Chester did not set forth findings of fact based on competent proof contained in the record to arrive at the conclusion he

did. What is interesting with this matter is that the evidence before this Court indicates that no witnesses were brought forth by the Employer in support of its assertions against the Applicant during the disciplinary hearing. It is therefore a mind boggling mystery why the Chester rejected the findings and recommendation of the Chairperson without setting forth competent proof contained in the record of the disciplinary hearing to support his conclusions. This was a procedural anomaly by the Managing Director.

18. Another procedural anomaly is that in rejecting the recommendation of the Chairperson the Managing Director of the Respondent completely ignored the sacrosanct right of the Applicant to be heard prior to this adverse decision to dismiss him being taken. Our law is that the Applicant had to be allowed an opportunity to make representation before the decision to reject the recommendation could be taken and his services terminated. Clearly this is not what occurred in this matter before the Court. It was utterly wrong and unacceptable both from the legal and constitutional perspective that Derick Chester simply unilaterally changed the recommendation of the Chairperson without even affording the Applicant or his representative an opportunity to be heard. This was a gross violation of the natural justice principle of *audi alteram partem* rule. When David Chester interfered with the recommendation of the Chairperson of the hearing, he literally threw the

principles of natural justice through the window in a clear spirit of the end justifies the means. Not only that, he thereafter failed to afford the Applicant the right to challenge this decision by way of an appeal. For these reasons, the finding of the Court is that the dismissal of the Applicant, Kenneth Ngwenya was procedurally unfair.

19. In relation to the suspension without pay though, the Employment Act under section 39(1) states that an employer may suspend an employee from his employment without pay where the employee is suspected of having committed an act which, if proven, would justify dismissal or disciplinary action. But in terms of section 39(2) such suspension without pay shall not exceed a period of one month. In this matter, the Applicant was suspended without pay for 21 days. His suspension was therefore in line with the Act.
  
20. When the services of the Applicant were terminated on 14 December 2001, he had been in continuous employment with the Respondent for a period of a year and almost three months. In light of the fact that the Court has made a finding that his dismissal was substantively fair but procedurally unfair, the Court determines it is just and equitable that he be awarded 4 months

compensation for the procedurally unfair termination of his services. The Court makes no order as to costs. The members agree.

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**T. A. DLAMINI**  
**JUDGE – INDUSTRIAL COURT**

**DELIVERED IN OPEN COURT ON THIS 03<sup>RD</sup> DAY OF FEBRUARY 2015.**

*For the Applicant : Mr. M. Ndlangamandla.*

*For the Respondent : Attorney D. Jele (Robinson Bertram Attorneys).*