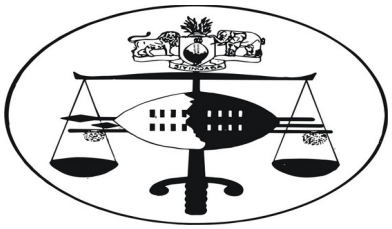

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 58/09**

In the matter between:

CAIPHUS DLAMINI Applicant

and

SWAZILAND WATER SERVICES CORPORATION Respondent

Neutral citation: *Caiphus Dlamini v Swaziland Water Services Corporation (58/09) SZIC 45 (September 28 2016)*

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

Heard submissions: **14/09/2016**

Delivered judgement: **28/09/2016**

Summary---Applicant employed in terms of a three-year contract---Dismissal before the expiration of the three year period on alleged misconduct and gross negligence---Respondent failing to prove the alleged misconduct or gross negligence---Respondent's lawyer asking the Applicant to write a resignation letter because decision to dismiss him has already been made.

Held---In an application for determination of an unresolved dispute where the Applicant claims that he was unfairly dismiss the burden of proof is on the employer to prove on a balance of probabilities that the dismissal was for a fair reason.

Held Further---It is procedurally unfair to hold a disciplinary hearing against an accused employee if the decision to dismiss that employee has already been taken by the employer.

JUDGEMENT

---

1. This is an application for determination of an unresolved dispute instituted by the Applicant against the Respondent.

2. The Applicant is an adult Swazi male of Ezulwini, in the Hhohho Region.

3. The Respondent is a statutory body duly established in terms of the laws of the Kingdom of Swaziland with its principal place of business at Ezulwini, in the Hhohho Region.

4. The case of the Applicant on the papers is that he was unlawfully, unfairly and unreasonably dismissed by the Respondent on 23rd July 2008. The Applicant further stated in his papers that his dismissal by the Respondent was substantially and procedurally unfair because the Respondent did not have a fair reason for terminating his services, and the Respondent did not follow a fair procedure before terminating the Applicant's services.

5. The Respondent in its Reply denied that it unlawfully terminated the services of the Applicant. The Respondent stated in its Reply that the services of the Applicant were terminated in terms of Section 36 of the **Employment Act No.5 of 1980** as amended, for reason of gross misconduct. The Respondent further stated that all procedures relating to the termination of the Applicant's services were followed.

6. The Applicant did not accept that his termination was fair and reasonable. He therefore reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The dispute was not resolved and CMAC duly issued a certificate of unresolved dispute. The certificate of unresolved dispute is attached to the Applicant's statement of claim and is marked **Annexure "A".**

7. The evidence led before the Court revealed that the Applicant held the position of Technical Services Director at the time of his termination

on 23rd July 2008. He was employed by the Respondent in terms of three-year fixed term contracts. His last fixed term contract was with effect from 01st February 2006 and was to run for a period of three years. The Applicant did not complete the agreed period of three years as he was dismissed by the Respondent on 23rd July 2008.

8. The Applicant was charged with ten disciplinary charges mostly involving gross misconduct and dishonesty. He was found not guilty on counts 3, 5, 8 and 9. He was found guilty on counts 1, 2, 4, 6 and 7. On counts 1, 2 and 7 he was sentenced to summary termination. On counts 4 and 6 he was sentenced to final written warning.

9. The charges that the Applicant was facing appear in **Exhibit R3**. On count 7 the Applicant was facing the charge of dishonesty. It was alleged that the Applicant deliberately gave the Managing Director false information to the effect that pumps had been ordered. No evidence, however, was led before the Court by the Respondent to prove on a balance of probabilities that the Applicant committed this offence. The Respondent led the evidence of only one witness before the Court, being RW1, Sikhumbuzo Tsabedze. This witness was not employed by the Respondent at the time relevant to the issues before the Court in this case. He therefore told the Court secondary information.

10. Counts one and two related to the malfunctioning of an industrial effluent meter at Cadbury. The evidence revealed that this industrial effluent meter was not functioning properly resulting in giving

inaccurate readings which caused a direct loss of income to the Respondent of up to E77, 098.33. The Applicant was charged with misconduct or alternatively neglect of duty.

11. The Applicant told the Court that as Technical Services Director he was not directly dealing with instrumentation at the Respondent's place. There were other employees that reported to him like the Mechanical and Electrical Engineer. The Applicant told the Court that the Mechanical and Electrical Engineer was all along aware of the problem of the meter but did not report the matter to him. The Applicant only got to know about the faulty meter when he was asked about it by the Managing Director. The Managing Director raised this issue by the letter dated 08th February 2008 (**Exhibit R1**).

12. The Applicant responded to the Managing Director's letter of 08th February 2008 by letter dated 12th February 2008 (**Exhibit R2**). The Applicant in this letter told the Managing Director that in order to be able to respond to the queries he has written a letter to his subordinate, the Mechanical and Electrical Engineer demanding answers from him. The letter to the Mechanical and Electrical Engineer, Mr. Shadrack Dlamini, was written on 11th February 2008. The Mechanical and Electrical Engineer responded by letter dated 13th February 2008. In this letter the Mechanical and Electrical Engineer stated, *inter alia*, that;

12.1 "The instruments section which is an electronic section within the M & E Department has a duty to maintain and service all the SWSC industrial effluent meters.

12.2 There is a routine program that is followed by the instruments section to check and perform a recalibration exercise on each of the industrial effluent meters on weekly basis.

12.3 The Cadbury meter was on the 08th of June 2007 discovered faulty, where the Ultra Sound Sensor had drifted from its preset span level/ position. This fault was corrected on same day.

12.4 I personally took it that the known error or fault which has caused much misunderstanding was within the level of my powers to correct it, as the error period must be between a day to two weeks maximum possible period of faulty reading. I took the responsibility of writing to the Commercial Manager soon after Cadbury queried their reading for the month of June 2007.

12.5 I am to assume that, during the Cadbury/SWSC discussion, the meeting was incorrectly informed about the meter being faulty from June to December 2007, hence the wrong conclusion that Cadbury has been unjustly billed over the long period as stated above.

12.6 I am in the feeling that SWSC was not adequately represented during the SWSC Cadbury meeting hence without this information I am presenting to you now, SWSC was led to concede to these revenue losses."

13. From the explanation given by the Mechanical and Electrical Engineer, there is clear evidence that he was in control of the situation regarding the faulty meter. He only had a problem of fixing the faulty meter in the middle of December 2007 because the suppliers Cosmos Controls from Nelspruit had closed for the Christmas holidays to re-open on 10th January 2008. When he contacted the company again after they had opened, he found that they were busy doing some installation works in Mozambique. The company finally came to Swaziland on Thursday 14th February 2008.

14. The Mechanical and Electrical Engineer did not testify before the Court. There was no evidence that the Applicant was aware of the faulty effluent meter before the Managing Director raised the issue with him. The Mechanical and Electrical Engineer did not escalate the problem to the attention of the Applicant. The evidence that the issue of the faulty effluent meter had not been brought to the attention of the Applicant before the Managing Director raised it was not disputed. It will clearly be unfair therefore to attribute any fault or negligence on the Applicant.

15. In the letter dated 11th February 2008 written by the Applicant to the Mechanical and Electrical Engineer demanding answers, the Applicant stated in paragraph 4.2 that;

"In particular you are hereby required to respond and show cause why you cannot be called for disciplinary hearing."

This was clear evidence that as soon as the Applicant learnt about the issue of the faulty industrial effluent meter, he took action. Before the Applicant could initiate the disciplinary proceedings against the Mechanical and Electrical Engineer he was himself suspended on 14th March 2008. The Court therefore is unable to come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant was guilty of any misconduct or neglect of duty because;

15.1 *There was no evidence that the Applicant was aware of the faulty industrial effluent meter and did not do anything about it. The evidence points to the contrary that as soon as he became aware, he wrote a letter to his subordinate, the Mechanical and Electrical Engineer demanding answers.*

15.2 *The Applicant requested the Mechanical and Electrical Engineer to show cause why disciplinary action should not be taken against him. There was therefore no neglect of duty on*

the part of the Applicant to discipline the officer that was directly involved with the faulty effluent meter. The Applicant was himself suspended and called to appear before a disciplinary hearing committee. There was therefore no way that he could have been able to discharge his duties of disciplining the officer that was aware the faulty effluent meter but failed to report the matter to him.

15.3 The Mechanical and Electrical Engineer did not escalate the problem to the office of the Applicant because he was of the view that the matter was within the level of his competency.

16. There was also undisputed evidence before the Court that before the Applicant was suspended, he was called by the Respondent's lawyer, Sibusiso Shongwe, who asked him to resign. The Applicant told the Court that Sibusiso Shongwe asked him to resign because the Managing Director and the Chairman have already decided that he should be dismissed. The Applicant said he reported the matter to his family who advised him against it. The Applicant said Sibusiso Shongwe again called him and asked him if he had written the resignation letter. The Applicant said he was thereafter served with the suspension letter.

17. The evidence of the involvement of the Respondent's lawyer telling the Applicant to tender his resignation was not disputed. It seems

therefore that the Applicant's fate had already been decided even before the disciplinary hearing.

18. In terms of ***Section 42 of the Employment Act No.5 of 1980*** as amended, in an application, where the Applicant claims that he was unfairly dismissed, the Applicant has the burden to prove that he was an employee to whom Section 35 applied and that he was dismissed by the employer. It was not in dispute that the Applicant was employed by the Respondent in terms of a three-year fixed term contract. It was also not in dispute that the Applicant was dismissed by the Respondent before the expiry of the three years. The onus of proof that the services of the Applicant were fairly terminated was on the Respondent. It now only remains to be considered, in the light of the evidence before the Court, whether or not the Respondent was able to discharge the burden of proof.

19. It was argued on behalf of the Respondent that even if it were accepted that the Applicant was not aware of the problem of the faulty effluent meter, he ought to have known about it hence he was charged with negligence. The Court will dismiss this argument as it was not supported by the facts and the evidence before the Court. The evidence revealed that the Applicant attended monthly meetings called Executive Meetings where they presented Departmental reports to the Managing Director. The Applicant as Head of Department relied on reports made to him by his subordinates. If his subordinates had not given him any report about the faulty effluent meter, there

was clearly no way he could have come to be aware of the problem and be able to present it to the Executive Meeting.

20. It was clear from the evidence before the Court why the Mechanical and Electrical Engineer did not report the faulty effluent meter to the Applicant. He clearly stated in his response (**Exhibit "A")** that the fault was within his level of competency to correct it. He also stated in his response that there was a routine program that was followed by the instruments section that checked and performed a recalibration exercise on each of the industrial effluent meters on weekly basis.

21. From the evidence before Court, it has not been shown that the Applicant was in any way negligent in the conduct of his duties in the manner alleged on the charge sheet or at all.

22. The evidence of the Applicant that he was told by Sibusiso Shongwe, the Respondent's attorney to resign or face dismissal was not disputed. The disciplinary hearing must precede the decision to dismiss the employee. If the decision is taken before the disciplinary hearing, the disciplinary hearing is rendered a nullity or merely a sham. Dealing with this issue, John Grogan; ***Workplace Law*** 8th edition at page 193 stated the following:

"The purpose of a disciplinary hearing is to ensure that accused employees have an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of their accusers before an

adverse decision is taken. It is manifestly unfair if the decision is taken and a sham hearing follows."

23. It cannot therefore be said that the Applicant had a fair trial when the outcome had been pre-determined by the Respondent.

24. From the evidence presented before the Court, the Respondent failed to discharge the burden of proof that rested upon it to prove on a balance of probabilities that the termination of the Applicant's services was fair. The Applicant's application therefore ought to succeed.

25. The Applicant was engaged in terms of a three-year fixed term contract. He therefore knew that he was going to be employed by the Respondent for a period of three years. He was not a permanent employee. He was however unfairly dismissed before his three-year contract expired. The Court having found that he was unfairly dismissed he is therefore entitled to the payment of the remainder of the period of the fixed term contract as claimed in his papers.

26. Taking into account all the evidence before the Court the circumstances of the case, the interests of justice, fairness and equity, the Court will make the following order;

a) The Respondent is to pay the Applicant the amount of E205,000.00
b) The Respondent is to pay the costs of suit.

The members agree.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant:	Mr. M. Mkhwanazi (Mkhwanazi Attorneys)
For Respondent:	Mr. D. Manica (Sibusiso B. Shongwe & Associates)