

## IN THE INDUSTRIAL COURT OF SWAZILAND

### JUDGEMENT

CASE NO. 545/2015

In the matter between:-

**LEONARD MENDOZA**

**APPLICANT**

and

**SWAZI WIRE INDUSTRIES**

**RESPONDENT**

**Neutral citation:** *Leonard Mendoza v Swazi Wire Industries (545/15) [2017] SZIC 14 (08 March 2017)*

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

**Heads Considered:** **15 FEBRUARY 2017**

**Delivered** : **08 MARCH 2017**

**Summary:** *Labour Law - Unfair Dismissal – Applicant alleges unfair dismissal by Respondent following by a disciplinary enquiry. Applicant charged with offence of gross insubordination. Respondent failing to prove that refusal by employee was a deliberate act of disobedience. Held – All cases of alleged unfair dismissal are assessed on the basis of two criteria; substantive and procedural fairness. Held – In Casu the Respondent Employer has failed to prove that the dismissal of Applicant procedurally and substantively fair. Held – Application accordingly succeeds.*

1. The Applicant, Leonard Mendoza, is a former employee of Swazi Wire Industries, the Respondent in these proceedings. His evidence was that he started working for the Respondent in February 2009 until 30 July 2014, when he was unfairly dismissed. He now claims against the Respondent the following; notice pay, severance allowance, additional notice pay and maximum compensation for the unfair termination of his services. The Respondent on the other hand vigorously opposes the claims of the Applicant, contending instead that his dismissal was procedurally and substantively fair, hence it feels it is under no obligation to pay Mendoza's claims. The matter is now before this Court for determination of this dispute of the parties.

2. The case of the Applicant, according to his testimony, can be summarised as follows; he is originally from the Philippines and had initially come to Swaziland to work for WBHO in Mbabane. He then met a certain Wyne Allen, one of the Directors of the Respondent, who recruited and offered him a job at Swazi Wire Industries. Wayne Allen wanted to make use of the Applicant's technical prowess since he had been told that Asian nationals were good in technical jobs. After some discussions he agreed to join the Respondent and was offered a contract which he accepted and signed and

thereafter started work. His first task was to install 3 machines which had been purchased by Allen from Taiwan, which he executed satisfactorily. He also trained junior employees in operating the machines and production went ahead full steam such that clients of the Respondent were happy with their work and more orders came in.

3. With more orders coming in the company could not meet the high demand of the clients hence the need for more machines. As a result Wayne Allen had to again travel to Taiwan to procure more of these wire producing machinery. Indeed Allen travelled to Taiwan and purchased more machines. When he returned though these machines were not installed by the Applicant but by the workshop employees. After installation the Applicant was then called and instructed to run one of the machines. Upon inspection the Applicant discovered that Allen had purchased a machine with a square spinner and a roller inside instead of one with a round spinner and a dye inside. Apparently the machine had been converted by the workshop employees to a round spinner with a dye inside. The Applicant was uncomfortable with the task given to him because as far as he was concerned it was impossible to convert the machine without damaging it. He informed Allen that it was impossible to convert the machine without damaging it

hence he refused to run it. As a result of his refusal he was suspended and slapped with a charge of insubordination.

4. Initially he was invited to appear before a disciplinary hearing slated for 10 July 2014, which however did not proceed. Then on another day, and whilst still on suspension, he went to the company premises for some personal errands. His evidence is that when he was seen within the premises he was summoned to the boardroom where he was there and then informed that his hearing was to proceed at that very moment. He was ambushed so to say. There was no notification about this date. When he asked where the representative from human resource department was, none was available. He also informed the chairperson that he wanted to be represented. The hearing proceeded despite his protest. He decided not to participate in the hearing and left the boardroom. The decision of the hearing was that his services were terminated with effect from 30 July 2014, hence now this present application before Court for determination.
  
5. Under cross examination by the Respondent's Attorney, Attorney Mr. S. Gumedze, the Applicant conceded that he had declined to run the machine because he had not been the one converted same, so he refused to touch it. He disputed that his refusal to touch same was an act of insubordination. On

the hearing, he maintained that he appeared before the disciplinary tribunal on 10 July 2014, on which date the hearing could not proceed. He maintained as well that he was not informed of any other date when it was to proceed, hence his assertion that he was ambushed on 17 July 2014.

6. The Applicant called 2 more witnesses in support of his case, Sandile Shongwe and Ntokozo Dlamini. These two testified on the Applicant's character. They informed the Court that they had good work relations with the Applicant and that during his tenure as Production Manager their customers were happy and that production was very good. He was very helpful and taught employees how to run the machines and properly execute their jobs. When he was transferred to the stores department there was a significant decline in production such that the employees would call him now and again to assist when they encountered problems. On the contrary they testified that Keith Allen was ill-tempered. He was always shouting at employees whenever he was around and they were not comfortable around him. That was the Applicant's case.
  
7. Respondent called three witnesses in support of its case, Mbuso Sikhondze, Sabelo Simelane and Linda Ntezinde. Witness Mbuso Sikhondze testified on

the conversion of the machine which led to the dismissal of the Applicant. He testified that the company had challenges in supplying one of its big clients, Palfridge, with a small diameter wire. So it was decided that one of the machines would be converted to produce this small diameter wire. The conversion was from a 4 to 7mm diameter wire to a 2 to 2.5 mm. For this exercise the workshop department enlisted the services of an engineering company, Toolplast. As they carried out the exercise they encountered a number of difficulties because the machine had been designed for something else and they were converting it to do something it was not designed for. They were eventually able to successfully convert same. It was tested and it produced perfect small diameter straight wires. They took samples of the small diameter wires to the client and same were approved by the client.

8. Under cross questioning by Attorney Mr. Tsabedze for the Applicant, this witness pointed out that he was always present when this conversion exercise was undertaken and that it took 2 full months to successfully convert the machine. He conceded that during this period the Applicant was not part of the team working on the machine. Even when it was tested, he was never called to witness that it had been successfully converted as he was in the stores department. According to this witness there was a certain Sibusiso

Vilakati who was now more knowledgeable than the Applicant in the converted machine. Sibusiso Vilakati also trained another employee, Sibusiso Dlamini, in running this converted machine. When asked why it had been necessary to instruct the Applicant to run the machine when he was not there when it was converted and when there was someone more knowledgeable than him in this converted machine, Sikhondze informed the Court that he not aware of the reason behind.

9. The second witness to testify in support of the Respondent case was Sabelo Simelane. He introduced himself as the Production Manager. He informed the Court that the Applicant was his subordinate in the production department. He explained that the Applicant was previously in the stores department but was then transferred to the production department following a disciplinary hearing. This transfer was at the instruction of Dale Allen and Linda Ntezinde, who had informed this witness that he (Applicant) was on the verge of being dismissed and asked if he needed the Applicant's skills and he answered in the affirmative, hence his transfer back to the production department from stores. In essence this was a demotion since the Applicant was now going to be subordinate to Sabelo Simelane, who had previously worked under him.

10. This witness also testified about the conversion of the one of the machines to produce small diameter straight wires. In fact it emerged that the instruction for the conversion of the machine came from this witness. The conversion of this machine came about as a result of a big order from Palfridge for 2.5mm straight wires. This witness also revealed that the instruction to the Applicant to run the machine came from him. In this regard he testified that he wrote out a task letter and handed same to the Applicant for execution. The task letter was instructing him to run machine 6. When he went to investigate how production was going he found that the Applicant was not running the machine he had instructed him to. He explained to the Applicant that the machine had been successfully converted and that it was working perfectly but the Applicant would hear none of this and would not budge, he refused to touch the machine. When asked why he instructed the Applicant to run the machine, Simelane explained that as Supervisor, the Applicant had to commission the machine.
  
11. As they argued about the running of the machine they were approached by Keith Allen who enquired as to what they were arguing about. This witness explained the problem, and the Applicant still insisted that the machine could



not be converted and he stormed out of the production area. This witness then decided to prefer the charge of insubordination against the Applicant which culminated in the termination of his services. According to Simelane, the hearing was initially supposed to commence on 10 July 2014 but could not. It was then postponed to a week later, on 17 July, and the Applicant was informed verbally of this new date and this was also reduced into writing. On 17 July the hearing commenced and it was chaired by Linda Ntezinde and this witness was the initiator. After Keith Allen had testified at the Applicant's hearing, the Applicant indicated that he had no questions ask and thereafter stormed out of the boardroom. The Chairperson returned a verdict of guilty and the Applicant was dismissed.

12. The last witness called in support of the Respondent's case was Linda Ntezinde, the Chairperson of the Applicant's hearing. Her evidence was that on the initial date slated for the hearing it could not proceed because the boardroom was in use. As a result she, the Applicant and the Human Resources Manager convened at the HR's office where she postponed the hearing to a week later. Interestingly she made no mention of anything in writing to that effect. On the second instance the hearing proceeded with the Applicant present. He represented himself and when the charge was put to

him he entered a plea of not guilty. The Initiator was Sabelo Simelane and he paraded two witnesses, Mbuso Sikhondze and Keith Allen. Sikhondze testified on the successful conversion of the machine and Allen on the refusal of the Applicant to take an instruction from his Supervisor to run the converted machine.

13. Ntezinde's further evidence was that after testimony of Allen the Applicant indicated that he no questions for him and the Initiator closed his case. She then gave the Applicant the opportunity to state his case but instead of doing so he stormed out of the boardroom informing her that he had nothing to say. He was warned that the hearing would proceed in his absence and he still left. The hearing continued in his absence and she returned a verdict of guilty and recommended that the Applicant be dismissed. She also testified on a previous hearing of the Applicant which she also chaired where he had been charged for poor work performance. Her decision in that enquiry was that he be transferred back to the production department from the stores department instead of terminating his services. Under cross examination Ntezinde insisted that the Applicant had been informed verbally about the postponement of his hearing to 17 July. This was in contradiction to Sabelo Simelane's evidence that he was informed both verbally and in writing. This

witness clarified as well that the task given to the Applicant was to run the converted machine, which he refused to do contending that the machine could not be converted.

14. In determining the fairness or otherwise of the termination of the Applicant's services it has always been reiterated 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. Perhaps one needs to re-emphasise that 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 and for a fair reason, these are the notions of procedural and 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. On the other hand, if the Employer is able to prove that the probabilities of the Employee being guilty outweigh those that he is not, then the opposite is true, that is to say the dismissal will be deemed substantively fair.

15. In relation to matters of insubordination, the broad principles governing what constitutes an act of insubordination that would justify a dismissal are set out in *Lynx Geosystem (Pty) Ltd v CCMA and Others [2010] ZALC 154*, a judgement which the Applicant's Counsel relied on in his heads of argument. In that judgement the Court held that as a general rule, for insubordination to constitute misconduct justifying a dismissal, it has to be shown that the employee deliberately refused to obey a reasonable instruction by the employer. Not only that, but certain prerequisites must also be present. These prerequisites are spelt out in *Ntsibande v Union Carriage and Wagon Co (Pty) Ltd (1993) 14 ILJ 1566 (IC) at 1569I – 1570A*; a) an instruction must have been given, b) such instruction must be lawful and c) the reasonableness of the instruction should be beyond reproach. Over and above this, the refusal to obey the instruction must be serious enough to warrant a

dismissal. In *Commercial Catering & Allied Workers Union and Another v Wooltru t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC) at 314 H – J* it was stated thus;

*“The offence of insubordination in the workplace has, in this regard, been described by our courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer’s authority.”*

16. Now, in this matter, the evidence is that when the Applicant was given the instruction to run and commission the machine it had already been converted. In fact, witness Mbuso Sikhondze testified that this had been done by his unit in the workshop department and that they had enlisted the help of Toolplast to successfully carry out the conversion. This took a period of 2 full months. This witness also testified that the after successful conversion employees Sibusiso Vilakati and Sibusiso Dlamini were trained in using this machine.

17. The totality of the evidence before Court indicates that the when the Production Manager initially approached the Applicant to run and commission the machine, the Applicant was not aware that the machine had already been converted, hence his refusal to run it. As far as the Applicant was concerned, he was being ordered to do the impossible, to convert the

machine. The Production Manager tried to convince him that the machine had already been converted but the Applicant still insisted that it could not be converted. Obviously the Applicant and the production Manager were not on the same wave length. They were not of the same mind. The Applicant thought he was being instructed to convert the machine.

18. In view of the above, can it be said therefore that the Applicant deliberately refused to obey a reasonable instruction by his employer, can it be said that he was challenging the authority of the employer? Clearly not. The refusal by the Applicant to obey the instruction was not deliberate. Instead it was based on the misconception that the instruction to him was to convert the machine, which he thought was an impossible task. His refusal therefore cannot be said to be wilful because he misconceived the instruction given to him, he did not fully comprehend what was required of him. His refusal cannot be said to have been be a serious challenge to the employer's authority. It cannot be said to have been an act of defiance. The evidence indicates that the conversion was done without the Applicant's involvement and that when the machine was tested he was also not present. Even when informed that it had been converted he was still not convinced stating instead that it was impossible and that he did not want to touch it, lest he damages it. Perhaps the Production Manager should have run the machine himself first to

show to the Applicant that it had already been successfully converted, instead of asking him to run it when he was never part of the conversion team in the first place. It was therefore unreasonable of the Production Manager to instruct the Applicant to run and commission the machine in the circumstances, without first showing him what had been done on it or even running it himself.

19. The evidence of the Production Manager was to the effect that when he commissioned the conversion the Applicant was still in the stores department where he was the Stores Manager. He therefore ought to have trained and orientated him on this converted machine, just like Sibusiso Vilakati and Sibusiso Dlamini. If perhaps he had been trained or shown that the machine had been converted and still refused to run it, then he could be said to be deliberately refusing to take instructions. In this matter the refusal of the Applicant was a statement to say '*...it cannot be done*' as opposed to '*...I don't want to do it*'. It should be noted that whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. This in essence means that mere refusal to carry out an instruction cannot, on its own, constitute insubordination, which by its very nature requires disobedience or an outright challenge to authority.

20. 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, Swazi Wire Industries has failed to prove on a balance of probabilities that the Applicant, Leonard Mendoza, committed an act of serious misconduct so severe as to warrant his dismissal. The finding of the Court is that the dismissal of Leonard Mendoza was unreasonable in the circumstances of the case and therefore substantively unfair.
21. On the procedural aspect, the evidence of the Applicant is that he was not aware that his hearing was proceeding on 17 July 2014. On the other hand the evidence of witnesses of the Respondent, Sabelo Simelane and Linda Ntezinde, was contradictory on this issue. Witness Simelane testified that when the hearing was postponed on 10 July the Applicant was informed verbally and in writing of the new date and that he (Simelane) was present when it was so rescheduled. However witness Ntezinde on the other hand was that the Applicant was only informed verbally about such postponement. Another point of departure is that Ntezinde informed the Court that when the hearing was postponed it was done in the Human



Resources Manager's office and that in attendance were her, the Applicant and the HR Manager only. This means that Simelane was not present.

22. The ruling of the Chairperson also has a number of inconsistencies. The Court notes for instance that when the hearing was conducted there was no one representing the office of Human Resources. In disciplinary hearings it is imperative that an independent party, such as an HR Officer be present to observe that the hearing is conducted in a fair manner and according to policies and procedures in place and also to record minutes. It has been noted as well that the hearing is said to have been held on 17 March 2014, whereas we now know that that is not the case. Then in her decision the Chairperson finds the employee guilty of poor work performance when the charge was gross insubordination. In her recommendation she decides that the employee be returned to his former position in production. However she also decides that he be dismissed. In explaining all these inconsistencies and contradictions Ntezinde informed the Court that the ruling before Court was still a draft, it was still work in progress. Even then she still failed to produce the final document before Court.

23. In view of these inconsistencies and contradictions, the finding of the Court is that indeed it is probable that the Applicant was ambushed in his hearing on the second day. He was not accorded a proper and fair hearing. As such the finding of the Court is that his dismissal was also procedurally unfair.


24. The Applicant is now 55 years old. He is married with six children, of whom two are still teenagers. He had worked for the Respondent for five years. He has not been able to find alternative employment since his dismissal and at the time this matter was heard was awaiting its conclusion so he could relocate back to his country. Having found that it was unreasonable and unfair for the Respondent to terminate the services of the Applicant, the Court accordingly makes the following order;

a) The Respondent is hereby ordered and directed to forthwith pay the Applicant as follows;

i)	<i>Notice Pay</i>	<i>E 8, 100.00</i>
ii)	<i>Additional Notice Pay</i>	<i>E 5, 890.88</i>
iii)	<i>Severance Allowance</i>	<i>E 14, 727.20</i>
iv)	<i>8 months Compensation</i>	<i>E 64, 800.00</i>

***Total :*** ***E 93, 518.08***

The Court deems it just and equitable that the Respondent also pays the Applicant's costs of suit. The members agree.

  
T. A. DLAMINI  
JUDGE – INDUSTRIAL COURT

**DELIVERED IN OPEN COURT ON THIS 08<sup>TH</sup> DAY OF MARCH 2017.**

*For the Applicant : Attorney Mr. S. Tsabedze (Magagula Attorneys).*

*For the Respondent : Attorney Mr. S. Gumedze (V.Z. Dlamini Attorneys).*