



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 10/2010

In the matter between:

ALBERT MADZINANE

Applicant

and

ROYAL SWAZILAND SUGAR COMPANY

Respondent

Neutral citation : Albert Madzinane vs Royal Swaziland Sugar
Company
[10/2010] [2018] SZIC 139 [2018]

Coram : **L. MSIMANGO – ACTING JUDGE**
[Sitting with Mr. P.S. Mamba and Mr. E.L.B.
Dlamini Nominated Members of the Court]

Last Heard : 08th August 2018

Date Delivered : 11th December 2018

SUMMARY: The Applicant was dismissed by the Respondent for being found in possession of stolen Company property on the first count. The second count was that he connived with his friends in stealing a water pump engine which was used for irrigating Respondent's sugar cane fields.

The Applicant argues that he was acquitted by the Magistrate's Court, on both counts hence, his dismissal by the Respondent was unfair in the circumstances. At the end of Applicant's case Respondent applied for absolution from the instance. Absolution from the instance applications dismissed.

JUDGEMENT

- [1] The Applicant is Albert Madzinane, an adult Liswati male of Mhlume in the Lubombo District.
- [2] The Respondent is Royal Swaziland Sugar Company [Mhlume] a company duly incorporated and registered as such in accordance with the company laws of the Kingdom of Eswatini, carrying on business at Mhlume, in the Lubombo District.
- [3] The Applicant was employed by the Respondent on the 19th December 2000 as a team leader. He was continually employed by the Respondent until his services were terminated on the 27th July 2009.
- [4] In his evidence in chief the Applicant testified that he was called by Gabriel Sibandze who was his colleague and requested to deliver his

property at Applicant's homestead. The Applicant submitted that he enquired from Gabriel as to what kind of property was it that he wanted to deliver at the Applicant's home, the said Gabriel answered that it was building material. Further that, after the conversation the Applicant gave permission to Gabriel to deliver the building material at his homestead,

[5] It was Applicant's evidence that the reason he allowed Gabriel to deliver the building material at his homestead was that Gabriel's homestead was far from the main road, whereas, his was nearer, and that they worked together at Mhlume, actually the Applicant was Gabriel's Supervisor at work.

[6] The following day, after receiving the call, the Applicant testified that he went home, to have a look at the things that were delivered by Gabriel. When the Applicant arrived at his homestead it was the same time by which Police Officers from the Royal Swaziland Police and Security Officers from the Respondent's company arrived at Applicant's homestead.

[7] The Police and Security Officers related to the Applicant that the purpose of their visit was based on the fact that there was building material which had disappeared from the Applicant's place of employment and they

wanted to search Applicant's homestead. The Applicant told the Court that he gave permission to the Officers to carry out the search and they immediately found the building material which was mainly corrugated iron sheets. The Applicant indicated to the Officers that the building material was not his, it belonged to Gabriel Sibandze who had requested to deliver it at Applicant's home.

[8] Based on this allegation by the Applicant, the Police Officers requested for Gabriel's cellphone number which the Applicant duly gave to them. The purpose was to call so as find out if Gabriel had really requested to keep the building material at Applicant's homestead, he answered to the affirmative. Despite the fact that Gabriel had admitted that the building material belonged to him, the Applicant was advised by the Police Officers that he was guilty of keeping stolen property at his homestead, and was subsequently charged.

[9] A week after being charged with the offence of keeping company property at his homestead without authority, the Applicant was then charged with a second offence; being theft of a water pump engine.

[10] With regards to this offence the Applicant testified that one Saturday morning whilst he was on duty at his workplace he was visited by Sabelo

Sikhondze who is Applicant's brother in law. The purpose of the visit by the said Sabelo was to fix Applicant's motorbike.

[11] The Applicant testified that he was tasked with supervising 600 hectares of sugar cane, and that when he was about to knock off, he went to the pump house being accompanied by his brother in-law. The purpose of the visit to the pump house was to switch off the water pump engine. When the engine was switched off the Applicant and his brother in-law returned to Applicant's house.

[12] The Applicant submitted before Court that the keys to the pump house were kept by one Samson Dlamini, who was responsible for opening and locking the house. Applicant's responsibility was only to switch off the engine.

[13] It was Applicant's evidence that when everyone reported for work on a Monday it was discovered that the water pump engine had been stolen. The Applicant testified that he was called to the Security office to explain how the pump was stolen since he was on duty during the weekend. The Applicant answered that he knew nothing about the pump reason being that when he knocked off on Saturday everything was in order.

[14] Pursuant to the theft of the water pump engine the Applicant testified that he was then called by Tshaneni Police Officers, who advised him to report at the Police station, and when the Applicant reached the Police station he was charged with the offence of theft.

[15] A few days after being charged with stealing the water pump, the Applicant told the Court that he was then advised by the Police Officers that the pump had been found, and it was stolen by Sabelo Sikhondze, the Applicant's brother in-law.

[16] On that basis the Applicant testified that his dismissal was unfair in that he did not steal the water pump and the Magistrate's Court acquitted him on that charge. On the charge of being found in possession of company property without authority the Applicant submitted that Gabriel Sibandze admitted that he was the one who stole the property and was thereafter dismissed by the Respondent. Hence the Applicant wants to be compensated on those grounds.

[17] On cross examination the Applicant was asked by the Respondent's Attorney if he knew one Ntokozo Madzinane. The Applicant answered to the affirmative and advised the Court that Ntokozo was his relative. It was then put to the Applicant that Gabriel's evidence at the hearing was

to the effect that the stolen building material was divided amongst the three of them, being the Applicant, Gabriel Sibandze and Ntokozo Madzinane. In this regard the Applicant was asked why the material was divided amongst the three of them. The Applicant answered that he could not explain that as he was not there when the building material was divided, further that, Gabriel knew that he had stolen the property and he was playing tricks with the Applicant by requesting to deliver the property at Applicant's homestead.

[18] With regards to the theft of the water pump it was put to the Applicant that Sabelo Sikhondze gave evidence to the effect that he wouldn't have stolen the water pump if the Applicant had not shown it to him. The Applicant denied that he showed Sabelo the water pump, as he was not around when it was stolen, and that he did not in any way connive with the said Sabelo to steal the pump.

[19] At the close of Applicant's case the Respondent advised the Court that it will not be calling any witnesses. Instead, filed an Application for Absolution from the instance.

[20] In support of the application for absolution the Respondent submitted that during cross examination the Applicant conceded that, the procedure

which was adopted by the Respondent was in terms of Respondent's disciplinary code and as such the procedural aspect of the dismissal should fall away, as proper procedure was followed.

[21] On the substantive fairness aspect, the Respondent argued that the Applicant conceded that there was evidence presented by the company against the Applicant at the hearing, in particular that stolen items were found at Applicant's residence, and that his brother in-law stole a pump after being shown it by the Applicant.

[22] The Respondent argued further that, in terms of Section 36 (b) of the Employment Act it shall be fair for an employer to terminate the services of an employee, because the employee is guilty of a dishonest act. Hence, from Applicant's own admission it was substantively fair to terminate his services for the following reasons:

22.1 Stolen company property was found at his homestead.

22.2 The Applicant did not immediately report that there was stolen company property at his homestead.

22.3 The pump was stolen after the Applicant had shown his brother in-law where it was kept.

22.4 The Applicant did not challenge the evidence of the Security Guard who testified that the Applicant was amongst the people who were present when the pump was stolen.

22.5 The Applicant admitted that he went through a disciplinary hearing that found him guilty and was dismissed, further that, he was granted opportunity to appeal the dismissal to level one and level two, however, the decision was confirmed and this was done in terms of the Respondent's disciplinary code.

[23] The Respondent submitted that on the basis of these arguments, the Applicant has provided to the Court evidence that he was dismissed for a reason permitted by Section 36 of the Employment Act, in that whilst in a position of trust, it was fair and reasonable to terminate Applicant's services.

[24] The Respondent submitted that the Applicant has not made out a case to be entitled to the claim for unlawful dismissal, thus applied that it be resolved from the instance.

[25] On the other hand the Applicant alleged that while the termination of Applicant's services was unfair, the manner in which the termination was reached was also unfair.

[26] The Applicant submitted that in his claim, he prayed for 9 months salary for unpaid suspension. The Applicant argued that this was premised on the fact that the Applicant was suspended without pay on the 3rd November 2008 and subsequently dismissed from the Respondent's employ on the 27th July 2009. Further that, in Applicant's written claim as well as in his testimony before Court prayed to be paid from the period of suspension up to the date of termination.

[27] The Applicant argued that Section 39 of the Employment Act of 1980 regulates the suspension of employees from the workplace, and provides as follows:-

39 (1) An employer may suspend an employee from his or her employment without pay where the employee is:

(b) Has or is suspected of having committed an act which, if proven, would justify dismissal or disciplinary action.

(2) If the employee is suspended under Subsection (1) (b), the suspension without pay shall not exceed a period of one month.

[28] The Applicant averred that he was suspended without pay for a period of 9 months. The conclusion is thus inescapable that the Respondent violated Section 39 of the Act. Furthermore, the Respondent's own

Regulations prohibit an employee from being suspended pending the outcome of an inquiry for a period exceeding 3 months.

[29] The Applicant submitted that the Respondent failed to cross examine Applicant on this aspect. Thus the failure to cross examine the Applicant on his claim for suspension means that the evidence has not been challenged and put into doubt. The Applicant prayed that the Application for Absolution from the instance be dismissed on this ground.

[30] The applicable test to be applied by the Court when absolution from the instance is sought at the close of Applicant's case, has been stated by Miller AJA, as follows:-

“When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff **(GASCOYNE VS PAUL AND HUNTER, 1917 TPD 170 AT 173, RUTO FLOUR MILLS (PTY) LTD VS ADELSON (2) 1958 (4) SA 307 (T)**

[31] This implies that an Applicant has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution, because without such evidence no Court could find for the Applicant. As far as inferences from the evidence are concerned, the inference relied upon by the Applicant must be a reasonable one. Having said this, absolution at the end of an Applicant's case, in the ordinary course of events will nevertheless be granted sparingly, but when the occasion arises the Court should order it in the interests of justice.

[32] The question to be now answered is whether the Applicant has crossed the threshold of proof that the law sets when an Applicant's case is closed but the Respondent's is not.

[33] It is common cause that the Applicant was suspended by the Respondent with pay on the 23rd October 2008, as per annexure "AM1" on Applicant's bundle of documents. On the 3rd November 2008, Respondent informed the Applicant that the suspension would be without pay with immediate effect. A copy of the letter is annexure "AM2" on applicant's book of pleadings. The Applicant argued that he was suspended without pay for a period of 9 months. However, the

Respondent decided not to cross examine the Applicant with regard to the suspension.

[34] The learned Authors Hoffman and Zeffertt in their book THE SOUTH AFRICAN LAW OF EVIDENCE 4TH EDITION BUTTERWORTHS PUBLISHER, said the following about failure to cross-examine:

“if a party wishes to lead evidence to contradict an opposing witness, he should first cross examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly, if the Court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which will be alleged make his evidence unworthy of credit.”

[35] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to the fact by questions put in cross-examination, showing that the imputation is intended to be made and to afford the witness an opportunity whilst still in the witness box of giving an explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party

calling that witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated in the case of **BROWNE VS DUNN 1893 6 R 67 HL.**

[36] The failure to cross-examine the Applicant on his claim for suspension means that the evidence has not been challenged and put into doubt. Hence, there is a case to answer.

[37] In the case of SUPREME SERVICE STATION (1969) PVT LTD VS GOODRIDGE 1971 (1) RLR (A), BEADLE CJ stated that:-

“I must stress that the Rules of procedure are meant to ensure that justice is done between the parties and so far as it is possible, the Court should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within knowledge of a defendant ... the plaintiff should not lightly be deprived off his remedy without first hearing what the defendant has to say. A defendant who might be supposed to go into the witness box, should not be permitted to shelter behind the procedure of absolution from the instance.”

[38] In the circumstances the following order is made:-

(i) The application for absolution from the instance is hereby dismissed.

(ii) There is no order as to costs.

The Members agree.



L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. M. Magagula
(Zonke Magagula Attorneys)

For Respondent : Mr. M. Dlamini
(Robinson Bertram Attorneys)