



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 531/09

In the matter between:

DAVID M. MAGAGULA

Applicant

And

UBOMBO SUGAR LIMITED

Respondent

Neutral citation: David M. Magagula v *Ubombo Sugar Limited (531/09)*
[2018] SZIC 25 (April 09, 2018)

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

Heard submissions : 23/03/18

Delivered judgement: 09/04/2018

SUMMARY---Labour Law---Applicant dismissed by Respondent after having been found guilty of misappropriation of company tools---Company tools found at the Applicant's homestead at Ncandweni--- Applicant claiming that he bought the tools---Tools found with company stock identification numbers scratched off---On of the recovered tools, a grinder positively identified by the Respondent's managers by its serial number---Applicant asked to present mitigating factors before verdict---Such was an irregularity on the part of the chairman---Respondent failing to furnish the Applicant with the record of the disciplinary hearing

Held---The burden was on the Respondent to prove on balance of probabilities that the Applicant committed the offence in terms of Section 42 of the Employment Act. The Court comes to the conclusion that, on the evidence presented before the Court, the Respondent was able to discharge the burden of proof.

JUDGEMENT

1. The Applicant applied to the Court for determination of an unresolved dispute between him and the Respondent in terms of **Section 85(2) of the Industrial Relations Act No.1 of 2000** as amended as read together with **Rule 7** of this Court's Rules.

2. The Applicant in his application claims that he was unlawfully and unfairly dismissed by the Respondent. The Respondent denies the Applicant's claim. The Applicant is seeking payment of *notice pay, additional notice, severance allowance and maximum compensation* for the alleged unfair dismissal.
3. The Respondent stated in its Reply that the termination of the Applicant's services was lawful and fair in that the Applicant was found guilty of dishonesty after a disciplinary hearing.
4. The evidence led before the Court revealed that Applicant was employed by the Respondent as an **Artisan Helper** in the **Boiler Making Department on 08th August 1978**. He remained in continuous employment until he was dismissed by the Respondent by letter dated **23rd October 2008**.
5. During October 2008 a welding machine was stolen from the Respondent's workshop. The investigations that ensued led to the recovery of other missing items which included; shifting spanners, angle grinder, welding aprons, extension cables, fire hose, holder electrodes and a welding gas bottle set. The security company responsible for providing security at the Respondent's premises by the name of Satellite Security conducted the initial investigations. The matter was also reported to the Big Bend Police Station. During their investigations, the Security personnel together with the Big Bend Police Officers recovered some of the stolen items at the Applicant's homestead at Ncandweni.

6. The Applicant was charged with theft. He appeared before the Magistrate Court at Big Bend Circuit Court. He was found not guilty. He was acquitted and discharged. The Respondent also preferred disciplinary charges against the Applicant for misappropriation of the company properties. He appeared before an internal disciplinary hearing panel. He was represented by a colleague. After the hearing he was found guilty and dismissed.

7. During cross examination, the Applicant told the Court that there were three keys to the workshop from which the tools were stolen. He said he kept one key; his colleague Bheki Dlamini had one and also the Security person. He told the Court that the procedure was to write down the name of any employee who had come to take a tool from the workshop. He told the Court that when the police came to his homestead they said they were looking for a welding machine, but they then confiscated other items that were found at his homestead. The Applicant told the Court that the tools that were confiscated by the police belonged to him. He said he brought these tools from the sub-contractors that would come from time to time to carry out some work for the Respondent.

8. The evidence before the Court revealed that the tools were identified by senior employees of the Respondent at Big Bend Police Station. The company tools had identification marks. They were engraved

with company stock identity numbers. When the tools were recovered, the company identification numbers had been scratched off and had a new mark made by paint. The Applicant told the Court that he used the paint as an identification mark because he is uneducated.

9. The Applicant did not deny that the items were recovered from his homestead. His defence before the Court was that these items belonged to him.

10. The two witnesses that testified on behalf of the Respondent gave contradictory evidence during cross examination on the issue of how the sub-contractors got their working tools. RW1, Enock Msibi told the Court that the sub-contractors that came to perform certain tasks at the Respondent's place came with their own working tools. RW2, Clifford Manana told the Court that the contractors did not come with their own working tools. It was not in dispute however that the company tools were marked with a stock identity number. It was also not in dispute that the stock identity numbers were scratched or ground off and a new identity mark made by paint. The Applicant said the paint mark was made by him to identify his tools because he was not an educated person.

11. ANALYSIS OF THE EVIDENCE:

The Applicant did not deny that the company tools were marked with a stock identity number. He failed to explain why he had to grind or scratch his own tools. During the cross examination the Applicant

agreed that one of the tools that were found in his possession was a Metabo Angle Grinder. The stock or company identification number was scratched off. The serial number was however still visible. The Respondent was able to positively identify the angle grinder with the serial number from the computer record of the grinder.

12. Faced with the evidence of the serial number on the grinder, the Applicant told the Court that he bought the tools from the sub-contractors. The Court will reject the Applicant's evidence because of the following reasons;

12.1 If the Applicant bought the tools from the subcontractors, he failed to explain why he had to scratch off the company identification numbers on the tools. Assuming for one moment that it is correct that the Applicant bought the tools from the sub-contractors, his act of grinding off the company stock identification numbers shows that he knew that the tools had not been lawfully removed from the Respondent's workshop.

12.2 The Applicant failed to call or give the identity of the person who sold him the tools, both during the disciplinary hearing and during the Court proceedings.

13. The burden of proof was on the Respondent to prove, on a balance of probabilities, that the Applicant committed the offence with which he was charged. (**See: Section 42 (2) of The Employment Act, 1980 as amended**). The Court, taking into account all the evidence before the

it, will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant committed the offence of misappropriation of the company tools. The dismissal of the Applicant was therefore substantively fair.

- 14.** The evidence before the Court revealed that after the conclusion of the evidence, the Chairman asked the Applicant's representative to present mitigating factors. This was done before the Chairman issued a verdict. The Court is alive to the fact that a disciplinary hearing is not expected to conduct its proceedings like a Court of law. There are, however, basic principles of conducting a hearing that must be followed in order for the Court to come to the conclusion that the Applicant had a fair disciplinary hearing.
- 15.** To ask the Applicant to present mitigating factors even before the verdict was pronounced was clearly unfair and irregular. The record of the proceedings shows that after the verdict, the Chairman again requested the Applicant present additional mitigating factors. The Applicant's representative reiterated what he had already presented before the verdict.
- 16.** After the disciplinary hearing the Applicant was informed that he could lodge an appeal within two working days. The Applicant requested to be furnished with the record of the hearing in order to prepare for his appeal. The Respondent failed to furnish the Applicant with the record. In the end the Applicant was unable to file an appeal.

17. There is therefore no doubt to the Court that the dismissal of the Applicant was procedurally unfair. An accused employee has a right to both substantive and procedural fairness, no matter how guilty the employee appears to the employer. The Court will therefore come to the conclusion, that the dismissal of the Applicant was procedurally unfair.

18. **RELIEF:-**

The dismissal of the Applicant was unfair only because the employer did not follow a fair procedure. The issue of re-instatement does not, therefore, arise. (**See:- Section 16 of the Industrial Relations Act No.1 of 2000 as amended**). In any event the Applicant did not pray for re-instatement. The Applicant told the Court that he is the sole breadwinner at home. At the time of his dismissal he had served the Respondent for about thirty years and had no disciplinary record. Taking all these factors into account the Court will come to the conclusion that compensation equivalent to six months' salary would be fair.

19. **ORDER:-**

The Respondent is ordered to pay to the Applicant amount of **E18,598.56** as compensation for the unfair dismissal of the Applicant within seven working days from the date of this judgement. Each party to bear its own costs.

20. The members agree.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *Mr. .D. Hleta*
(Attorney at H.M. Mdluli & Associates)

For Respondent: *Mr. N.D. Jele*
(Attorney at Robinson Bertram.)