IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 393/2005

In the matter between:

MOSES SHONGWE Applicant

And

SWAZILAND ELECTRICITY BOARD Respondent

Neutral citation: Moses Shongwe v Swaziland Electricity Board [2019] *SZIC 33* (24 April 2019)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 19 September 2018

Date Delivered: 24 April 2019

Summary *– Labour Law – Unfair dismissal – Applicant found guilty of drinking alcohol and driving under the influence of alcohol by disciplinary hearing chairman on basis of conviction at Magistrate's Court and dismissed.*

Held *– Employer cannot rely merely on conviction by criminal court for purposes of taking disciplinary action.*
Held *– Criminal court record must be read and employee given opportunity to state his case and explain why conviction is wrong.*
Held *– In absence of a consideration of applicants explanation dismissal is substantively unfair.*

Held – *Appropriate case for reinstatement of Applicant.*

JUDGMENT

[1] The present matter is an application for determination of an unresolved employment dispute arising from the termination of the Applicant's services by the Respondent.

[2] The Applicant was employed by the Respondent on 24th June 1992. When his employment was terminated, on 18th March 2005 he was a metre reader based at Stonehage in Mbabane. According to his salary slip he earned a salary of E6714.50 inclusive of housing allowance.

[3] It is common cause that on Saturday 5th February 2005 the Applicant travelled to Mahlabatsini in the Shiselweni region in a company vehicle to deliver a deceased colleague's personal property to his parental/traditional home. The Applicant was authorised to take the trip and travelled with one Jerome Xaba, a fellow employee and brother to the deceased colleague (Stanley Xaba). Applicant was the driver of the Respondent's vehicle.

[4] On their return to Mbabane, Applicant and Jerome Xaba gave the deceased's mother a lift to Mbabane, dropping her off at Sidvwashini, where she lived. On their way to the Stanley's mother's place of residence the Applicant met an accident at Qobonga Complex in Sidvwashini where he knocked and scratched a vehicle that was parked by the roadside. The Police were called to the scene of the accident and when they went to the Respondent's truck, they found an empty 750ml beer bottle on the floor on the passenger side of the vehicle.

[5] Accordingly to the Applicant, the 750 ml bottle belonged to Jerome Xaba. His evidence was that on their way back from Mahlabatsini Applicant and Jerome had met friends at Mkhondvo and had stopped for a few minutes to chat with them. The friends were drinking marula and offered Jerome and Applicant some. Applicant admitted to having taken, at most, a mouthful of the marula (what he called "izwi") while Jerome had a cupful. Over and above that the friends poured some of the brew into a 750ml beer bottle for Jerome to take with. It was this bottle that the Police found on the passenger side floor of the Respondent's vehicle. Jerome had been drinking from the beer bottle while they drove to Mbabane.

[6] Upon discovering the beer bottle the Police officer became suspicious of the Applicant's state of sobriety and insisted that they go to the Police station. The Applicant instantly refused to drive the Respondent's truck to the Police station on account of the fact that he was being accused of being drunk. He was eventually persuaded to drive to the Police station where he thought he would be tested for

alcohol content by breathalyser. He was not tested but was instead placed in cells after the "arresting" officer informed the officers they found at the Police station that Applicant had been apprehended for drunk driving.

[7] The Applicant was eventually released on bail on Sunday 6th February and told to appear at the Mbabane Magistrate Court on Monday 7th February. He was represented by an attorney at his bail hearing and at the hearing of 7th February, where he faced two charged – (i) negligent driving and; (ii) driving a motor vehicle whilst under the influence of intoxicating liquor or drugs.

[8] It was Applicant's evidence that he was advised by his attorney to plead guilty to the 2nd charge of driving a motor vehicle whilst under the influence of intoxicating liquor or drugs, because it would become costly for him to plead not guilty. A plea of guilty, he was advised would mean the matter ended on that day (7th February 2005) and would effectively cost him E 3000.00 (E2000 for the fine and E1000 in attorney fees) and Applicant would be able to return to work on the same day. A plea of not guilty would likely mean repeated trips to Court at a cost of E1000 each. Applicant testified that he chose the plea of guilty simply because it was his attorney's advice that he do so as it was expedient - expedient in terms of returning to work timeously and in terms of limiting the legal expenses from the incident.

[9] On his return to work the Distribution Manager Mr Ernest Mkhonta asked Applicant to explain certain allegations against him by preparing a comprehensive report

responding to each of the allegations. The relevant concerns brought to the Applicant were set out as follows;

"We have in our possession information that on or about Saturday 5th of February 2005 you did and unlawfully drove an SEB vehicle registered SD 759 GN under the influence of alcohol or habit forming drugs much against the Board's rules and regulations as contained in the Disciplinary Code and Procedures.

We also have in our possession information that on the same day indicated above, at or about 2100 hours you did unlawfully and negligently drove the said vehicle recklessly thus causing an accident and damage to it at or around Sidvwashini specifically at Qobonga Complex."

[10] The Applicant's response to this letter was not to the satisfaction of the management of SEB, accordingly to Mr Mkhonta. As a result Applicant was suspended from work, with pay from 10th February 2005 pending the finalisation of investigations and possible disciplinary proceedings against him.

[11] Disciplinary proceedings followed and by notice of disciplinary hearing dated 14th February 2005 Applicant was advised to attend a hearing at Checkers on 23rd February 2005 at 9 am to answer the following charges of misconduct.

"*2.1. On or about the 5th of February 2005 you did intentionally and unlawfully take intoxicating fluids and as a result you were under the influence of alcohol and/or drugs while on duty much against the organisations*

disciplinary code covering your bargaining unit. (See page 26 and 27 of the Disciplinary Code)"

2.2. On or about 5th February 2005 you did unlawfully and intentionally drive an SEB vehicle registered SD 759 GN under the influence of liquor much against the organisations Disciplinary Code."

2.3. On or about the 5th February 2005, you did intentionally and unlawfully misuse the Board's vehicle by driving to Sidvwashini, Qobonga in an SEB car registered SD 759 GN and while you were there the car collided with a stationery vehicle.

2.4 On the same day indicated in 2.1 above, at about 2100 hours you did unlawfully and negligently drive the said vehicle recklessly thus causing an accident and damage to it at or around Sidvwashini, specifically at Qobonga Complex."

[12] The Applicant pleaded not guilty to all five charges and at the end of the hearing, was acquitted and discharged on counts 3 and 5 and was found guilty on charges 1,2, and 4. The chairman of the disciplinary enquiry after analysing the evidence led and the mitigating and aggravating circumstances recommended that -

(i) "On the charge of taking intoxicating fluids and being under the influence while on duty… the appropriate sanction will a Final Written Warning;

(ii) With regard to the charge of driving an SEB vehicle the influence, I recommend that the accused be summarily dismissed due to the seriousness of the offence.

(iii) With regard to the charge of negligent driving I recommend that the accused be issued a final written warning."

The net effect of the recommendations was that the Applicant be dismissed. The recommendations were accepted by the Respondent and on 18th March 2005 the Applicant's services were terminated with notice.

[13] It is common cause that at the date of his dismissal the Applicant was an employee to who **Section 35 of the Employment Act 1980** applied. In terms of **Section 42 of the Act**, the *onus* rests on the Respondent to prove that it had a fair reason to terminate the Applicant's services to that such termination was substantively and procedurally fair and reasonable in the circumstances.

[14] In discharging the *onus* the Respondent called one witness, a Mr Jabulani Khanyile to prove, on a balance of probabilities that the Applicant had taken intoxicating liquids and had driven the Respondent's vehicle whilst under the influence of liquor or drugs on the fateful day. Mr Khanyile's evidence was that the Applicant had been assigned to return the belonging of the late Stanley Xaba to his traditional home at Mahlabatsini in the Shiselweni district; that on his return from Mahlabatsini and while at Qobonga, Sidvwashini in Mbabane Applicant had met an accident while driving the company vehicle; that as a result of the accident it was discovered that Applicant had been driving the vehicle whilst under the influence of alcohol; that the vehicle was impounded by the police and the

Applicant charged with driving the vehicle while under the influence of intoxicating liquor.

[15] It was Mr Khanyile's evidence that when the Applicant appeared before a disciplinary enquiry the employer depended on the receipt proving payment of the fine for "drink driving" by Applicant to conclude that the Applicant had driven the company vehicle whilst under the influence of liquor. It was his evidence that no other evidence of the Applicant's driving under the influence of alcohol was led or could be led because not only had he been unable to access the Applicant at the police station on the fateful Saturday night but the Respondent had no means of independently ascertaining the level of intoxication of the Applicant because the Respondent did not own breathalyser machines during Mr Khanyile's time at SEC.

[16] Much was made by the Applicant, of the lack of breathalyser testing and the Respondent's failure to independently prove that Applicant was indeed drunk on the fateful day, it being submitted that in terms of the disciplinary code clauses 11.04 and 11.05 it was the duty of the Respondent to prove that Applicant had indeed been intoxicated on the fateful day. Clause 11.05 places the burden of proving misconduct on management while clause 11.04 states what ought to happen where an employee is suspected of drunkenness.

[17] In our view clause 11.04 of the Code does not apply to the circumstances in which Applicant found himself. In our view this clause applies where an employee is

suspected of being drunk while on duty, for example if a supervisor suspects that one of the electricians in his team is drunk. It is in those circumstances that such employee can be subjected to blood tests or breathalyser readings in terms of the clause. The Applicant had been arrested on a Saturday night and the Respondent was advised he had been arrested for driving its vehicle while under the influence of liquor or drugs. He was convicted of the charge on the Monday, the Respondent having not had access to him. The question whether there was a deviation from the disciplinary code does not in our view arise in this respect.

[18] The question that arises is whether the Respondent has discharged the onus on it to show that it had a fair reason to terminate the Applicant's services. It is common cause that at the disciplinary hearing the Respondent relied on the admission of guilt and receipt of payment of the fine to conclude that the Applicant had indeed been driving its vehicle while under the influence of alcohol. It is also common cause that before this Court, the Respondent relied on the Magistrates Court Record which was filed as part of its admitted documents. It is also common cause that the Applicant admitted to having taken a sip of Marula brew (alcohol) and having pleaded guilty, at the Magistrates Court to the charge of driving a motor vehicle whilst under the influence of intoxicating liquor or drugs.

[17] Regard has to be had to the fact that this Court does not sit to review that decisions of the disciplinary hearing but that it conducts its own enquiry into fairness of a dismissal and that it is for the Respondent to show the Court that the Applicant had

indeed been driving under the influence on 5th February 2005 (see in this regard **Central Bank of Swaziland v Memory Matiwane SZICA 3/1998**). Other than the Magistrates Court record containing Applicant's plea of guilty and his conviction and sentence, no other evidence in this regard has been produced by the Respondent in proof of its defence. The Court was referred to the **John Grogan, Dismissal, Discrimination & Unfair Labour Practices, 2nd Edition** page 108 where the learned author discusses the scenario where an employee is convicted of a criminal charge and concludes that **"where a trial has run its full course and resulted in conviction, there seems to be no reason why an employer cannot rely on the Court's verdict in subsequent disciplinary proceedings, at least as *prima facie proof* that the employee committed the offence. This was accepted in Hassim v Incorporated Law Society of Natal".** It was the Respondent's submission that even though the Magistrate's Court record was not provided to the disciplinary chairman, the fact that it had been availed to the Court cured the position and placed the Court in a position to determine whether it was proper to impose the sanction of dismissal.

[18] The Applicant referred the Court to the case of **Mphikeleli Sifani Shongwe v The Principal Secretary of the Ministry of Education and 3 Others ICA Case No. 207/2006** and submitted that the Applicant's explanation of the plea of guilty at the Magistrate's Court was not considered contrary to the principles set out in this case. The principles set out in the case are set out in paragraph 28 thereof where the learned Judge President P.R. Dunseith says **"The position is the same where**

an employee has been convicted by a criminal court of a criminal offence which also gives rise to disciplinary charges. The employee is entitled to contest the correctness of the decision of the criminal court, *and to try and persuade his employer that his defence was not properly presented at the criminal trial, or that there is other evidence which establishes his innocence*, or that, for one reason or another, the criminal verdict was mistaken or wrong."

[19] In the **Mphikeleli Sifani Shongwe** case *supra* the court referred to the matter of **Randburg Town Council v National Union of Public Service Workers (1194) 15 ILJ 125** wherein the Labour Appeal Court stated that the chairperson of a disciplinary hearing could not just confirm that the employee was convicted but **"must read the record to satisfy himself that sufficient evidence was led at the criminal trial to justify the finding that the employee committed the offence/misconduct… .What is required is that the Chairperson must decide, after reading the court record, and after giving the employee an opportunity to state his case and explain why the conviction is wrong, whether on a balance of probabilities the employee is guilty of the misconduct charged."**

It is common cause that the chairperson of the Applicant's disciplinary enquiry did not have the benefit of reading and considering the Magistrates Court record regarding the Applicant's case there. This Court has had that benefit and in our view there is no reason why the sentiments set out by the Labour Appeal Court and quoted above should not equally apply to the Court.

[20] The Applicant admitted, in his evidence in chief that he took a sip of Marula brew. He consistently denied that he got drunk from that sip and insisted that he was not driving the Respondent's motor vehicle whilst under the influence of alcohol. His uncontroverted evidence was that after the accident had occurred and the police suspected that he was driving under the influence of alcohol, he asked the police that he be tested for alcohol content by breathalyser test and that this did not happen. It was not denied that Applicant was not tested for alcohol content by the Police. He further testified that he pleaded guilty to the charge on the advice of his legal representative. This evidence too was not controverted. He maintained at all times that he had not been driving under the influence.

[21] The Respondent did not challenge the evidence of the Applicant that he was not tested for alcohol content. It would not have been too difficult to do so, particularly at the disciplinary enquiry because Respondent would have been able to call on the evidence of the police officers that arrested the Applicant, the disciplinary hearing having taken place in the same month that Applicant was convicted at the Magistrate's Court. The importance of this is that the disciplinary code does not state the limit an employee must not reach to avoid contravening the rule against driving under the influence of alcohol. Further it appears that the Applicant's colleague who was travelling with him, Jerome Xaba, was never asked to testify either before the disciplinary hearing or before us, Xaba would have shed better light as to what happened when they met friends at Mkhondvo, whether the

Applicant had taken only a sip of the Marula brew or more. His evidence would have been good enough to corroborate the evidence of driving under the influence contained in the Magistrate's Court record. There was no indication why Mr, Xaba was not called at least to the disciplinary hearing save that the Respondent's attitude seems to have been that once it was established that the Applicant had been convicted at the Magistrate's court then there was no need to lead any other evidence of the misconduct. There was no explanation why Mr Xaba was not called to the Court hearing either.

[22] It is apposite to mention that we found the applicant to have been a reliable witness whose evidence was consistent. We consider also that he was convicted at the Magistrate's Court without any evidence being led and find that his version of events that he was advised by his attorney to plead guilty to the charge he faced despite not being under the influence of alcohol is not improbable in the circumstances.

[23] Further the Respondent's disciplinary code in use at the relevant time did not indicate what constituted being under the influence of alcohol nor did it set limits beyond which an employee who had had alcohol could not reach in order to fall foul of the rule against driving under the influence.

[24] In the circumstances we find that the Respondent has not, on a balance of probability, established that the Applicant indeed drove its vehicle whilst under the

influence of alcohol. We conclude therefore that the Applicant's dismissal was substantively unfair.

[25] We must add that the Respondent led no evidence with regard to the charge regarding the Applicant driving its vehicle negligently on the 5th February 2005 leading to an accident and damage to the vehicle. In the absence of such testimony it cannot be said that on this charge a valid reason for the termination was established.

[26] Another issue that arises is that of the sanction the Applicant received. It is common cause that the charges Applicant faced arose from the disciplinary code. However the sanction was not in terms of the code. The Applicant having been found guilty of driving under the influence of alcohol should have receive the sanction of a final written warning, it being common cause that the misconduct was Applicant's first. There was no indication given why it was necessary to deviate from the agreed sanction and in the circumstances despite that the code at 11.01 thereof states that reasons for the deviation from the code should be noted on the disciplinary Hearing form. (See **Swaziland Development Finance Corporation v Swaziland Union of Finance Institution and Allied Workers SZICA Case NO.07/2015).**

[27] The Applicant has claimed reinstatement. In considering whether such an order ought to be granted we take the following factors into account:

25.1 The Applicant worked for the Respondent for 13 years without blemish. He is 48 years old. Apart from piece jobs he has been unable to find alternative employment in his field and with his qualifications. He worked for the Times of Swaziland for 2 years from 2006 to 2008.

25.2 The Respondent's evidence regarding reinstatement was that the positions of linesman, electrician and driver (services the Applicant used to provide as part of his employment duties) still existed within the Respondent. The Respondent's evidence was that reinstatement was not possible because the position he occupied was declared redundant and that he had been away from work for too long a period. It was not suggested that a continued employment relationship with Applicant would be intolerable because of the circumstances under which he was dismissed. The Applicant stated in evidence that there are still Meters in existence that are being read. This evidence was not denied.

[28] We align ourselves with the following paragraph lifted from the case of **Menzi Ngcamphalala v Swaziland Building Society Case No. 50/2005:**

"A claim for reinstatement cannot be defeated merely by the filling the dismissed employee's position whilst the dispute awaits adjudication, otherwise the relief of reinstatement provided by the Act would be rendered nugatory. Section 16 of the Act requires the Respondent to go further and

show on a balance of probability that it is not reasonably practicable for it to reinstate the Applicant."

(See also **Collie Dlamini v Swaziland Electricity Board - IC Case NO. 105/2005**.

[29] We are cognisant of the fact that the matter has taken a number of years to be finalised. Our view however that is it is the duty of both parties to ensure that matters are heard timeously within the confines of Court procedures. We take cognisance as well of the backlog of cases that has plagued this Court. We find however that this is an appropriate case for a reinstatement order. In the circumstances we find that it would be unreasonable to require the respondent to pay the Applicant all arrear salaries and benefits from date of dismissal to date of reinstatement.

[30] We make the following order:

(a) The Respondent is ordered to reinstate the Applicant to his position as Meter Reader, or any other similar position of similar rank and remuneration in the Respondent's undertaking with effect from 1st June 2018.

(b) Applicant is to report at the Respondent's place of business to resume duty on 3rd June 2019.

(c) The Respondent is to pay the costs of the application.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. S. H. Nhleko (Dunseith Attorneys)

For Respondent: Mr S. Dlamini (Musa M. Sibandze Attorneys)