IN THE INDUSTRIAL COURT OF

ESWATINI JUDGEMENT

Case No. 236/2017

In the matter between:

MXOLISI SHONGWE Applicant

And

ROYAL SWAZILAND SUGAR CORPORATION Respondent

Neutral citation: Mxolisi Shongwe v Royal Swaziland Sugar Corporation [2017] SZIC 18 (03 March 2022)

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

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

Date Delivered: 03 March 2022

JUDGEMENT

[1] The applicant, Mxolisi Shongwe was employed by the respondent, the Royal Swaziland Sugar Corporation Ltd, (the respondent) on 3rd January 2012. He was in the continuous employment of the respondent until 31st March 2016 when he was dismissed by the respondent. He considered that he had been dismissed unfairly and therefore reported a dispute in terms of **section 85(1) of the Industrial Relations Act 2000 (as amended)** in which he alleged he had been unfairly dismissed both procedurally and substantively.

[2] The dispute was unresolved and thus certified so by the Conciliation, Mediation and Arbitration Commission. The applicant has applied to the Industrial Court for determination of the unresolved dispute. He is claiming reinstatement with payment of arrear salaries calculated from the date of dismissal to date of reinstatement. In the alternative, he seeks payment of severance allowance and maximum compensation for unfair dismissal.

[3] The respondent denies liability for the claim and avers that the termination of the applicant's employment was procedurally and

substantively fair and reasonable when considering all the circumstances of the matter. Respondent prays for the application to be dismissed with costs.

[4] It is common cause that the applicant was an employee to who **section 35** of the **Employment Act 1980** applied.

[5] The facts regarding the incident that led to the applicant being charged, taken through a disciplinary hearing and subsequently being dismissed, are largely common cause and can be summarised as follows -

5.1 The 27th June 2015 was a Saturday and the applicant, being on stand-by, was at his place of residence within the respondent's Mhlume estate.

5.2 At some point during the day one Hermon Msibi, an artisan fitter, called the applicant who was leading a rigging team that was doing some work on an R2 strike receiver in the refinery section of the respondent's Mhlume factory.

5.3 Mr Msibi wanted the applicant to provide a back up team to assist the rigging team. He also wanted the applicant to organise food for the rigging team, which had been working for a number of hours.

5.4 The applicant proceeded to the factory where he went into the refinery section. He met Hermon Msibi and discussed with him the progress made in repairing the R2 strike receiver. Mr Msibi explained that the rigging team had initially thought that the receiver's chain had slipped out of position and they had attempted to put it back in place without success. It then became apparent that the issue was with the bearings of the gearbox and that they would have to be replaced. This would necessitate the rigging of the R2 strike receiver gearbox and cover by the rigging team and they started that process.

[6] Applicant then went to his office, which was away from the refinery to arrange for the substitute team of riggers to replace those that had asked to be replaced. He also sought food for the team. He was able to secure a substitute team made up of Thokozani Shiba and Bongani Dlamini. He went back to speak to Hermon and they agreed

that the substitute team would wait for the riggers to bring the cover of the R2

strike gearbox to the workshop and that Thokozani Shiba and Bongani Dlamini would wait for the gearbox cover in the workshop. Thokozani Shiba was already there but Bongani Dlamini had not yet arrived.

[7] The applicant testified that after his discussion with Hermon, he then went back to his office to follow up on the food issue and to update the engineer on standby about the availability of the substitute rigging team. He further testified that while he was in his office the evacuation alarm went off and upon enquiry he learnt that Bongani Dlamini had fallen from height from where the R2 strike receiver gearbox was being rigged. Bongani was taken to the Company Clinic by ambulance and he succumbed to his injuries. It was the applicant's evidence that the first time he saw Bongani Dlamini on that day was when he lay on the floor having fallen from height - from the platform where the R2 strike receiver gearbox was.

[8] Following this incident, the applicant was charged with certain misconduct and called to a disciplinary hearing where he faced three charges as follows:

8.1 "There is prima facie evidence that you are guilty of the offence of gross dereliction of duty in that, while it being your responsibility as stand-by foreman, to supervise a *hazardous task, being rigging of an R2 strike receiver gearbox from height, you failed to implement and/or enforce adequate supervisory measures, thereby failed to minimise inherent risk in the operation on 2?fh June 2015.*

8.2 There is prima facie evidence that you are guilty of gross dereliction of duty in that, while it being your responsibility to supervise and observe the safety aspects of the operations used by the refinery section of the Miff you failed to ensure that the workplace was adequately demarcated, and to ensure that workers adhered to PPE requirements which included ensuring that their safety harnesses were on, ensuring that all appropriate safety requirements as per company policy were in place on the 2?fh June 2015

8.3 There is prima facie evidence that you are guilty of gross dereliction of duty in that, while it being your responsibility to carry out a *formal written pre-task risk assessment for the operation (being the rigging of the R2 strike receiver gearbox from* a *height in the refinery) and thereby effectively minimise inherent risk, you failed to carry out the formal pre-*

task risk assessment for the aforementioned operation on 27th June 2015."

[9] The applicant attended the hearing and pleaded not guilty to all the charges. At the end of the hearing the chairman found him guilty on the first two charges, being the failure to implement and/or enforce adequate supervisory measures thereby failing to minimise inherent risk in the operation on 27th June 2015; and failing to ensure that the workplace was adequately demarcated and to ensure that the workers adhered to PPE requirements which included ensuring that their safety harnesses were on and ensuring that all appropriate safety requirements as per company policy were in place on the 27th June 2015.

He was acquitted on the third charge. Consequently we will not concern ourselves with that charge.

[10] In his pleadings, the applicant alleges that the respondent failed, at the disciplinary hearings to establish that applicant was guilty of the

offences he was accused of; that the respondent's evidence failed to

establish a direct or at the very least, an indirect link between the alleged offences and the applicant as an accused employee.

[11] In his evidence, the applicant set out that he had been on standby on the fateful day and that the production supervisor Desmond Mabuza was in charge of the work site. He submitted that the team carrying out the work was competent enough to carry out the task; that he had only come to the work site for purposes of arranging the relief team and food as requested by Hermon Msibi. For that reason he left the responsibility to supervise the team and the task they were doing, with the production foreman as they were already doing the task. This was more so because he had not been called to provide technical assistance to the team carrying out the work. It was his evidence that the team working on the R2 strike receiver had been called for the work by the supervisor and that he, as foreman on standby is only expected to come to site only when notified of the need for technical assistance. The work site was in the competent hands of the Production Supervisor Mr Desmond Mabuza. According to applicant, it was Mabuza who was in charge of the work being carried out and it was he, therefore, who was responsible for ensuring that all health and safety protocols were

followed. It was also his duty to issue the safe work permit, once the scope of work had changed from fixing the strike 2 receiver at its platform to having to bring it down to the workshop. It was the applicant's testimony that he had brought to Mr Mabuza's attention that the scope of work had changed and that it was then up to Mr Mabuza to prepare the safe work permit.

[12] The respondent led one witness, Mr Mandia Tshawuka who had chaired the applicant's disciplinary hearing. His evidence was that the applicant had been on standby on the 2Jlh June 2015. He stated that being on standby meant that the applicant would stay at home ready to go into work if his maintenance team needed him to do so. If called in, he would be expected to fulfil the roll he normally did under normal circumstances i.e. on a daily basis. He confirmed that the applicant had been called for purposes of arranging food for the working crew and to have them substituted.

[13] Mr Tshawuka testified that evidence was led at the disciplinary hearing that the applicant had arrived at the site and had found that the gearbox cover had been removed and placed at the grating floor and that the

area had not been demarcated; that it could be deducted from the fact that the gear box cover was on the grating floor that the process of removing the cover had happened without the work area being demarcated. He stated that the applicant had left the work cite for his office having seen that the team was working without demarcating the work area and without harnesses. Further he did not ensure that a safe work permit was issued to take into account the change in the scope of the work. He stated that it was expected that the applicant would ensure that safety protocols were adhered to because he had been at the site of work and had seen that the employees were already doing work without following safety procedures. He was expected to do so as the most senior person in the team that was working, a manager and because he had been aware of previous fatal accidents that occurred where employees had ignored safety rules and that the respondent had taken a hard line with regard to safety rules because of these accidents and the need for employee safety.

(13] In his cross-examination of the applicant Mr Shabangu, for the respondent; established that the applicant had gone through a

number of training sessions on safety on the factory floor, provided by the

employer; that he was aware of the respondent's Fall Protection Plan for the Mhlume Factory and had, through the training been made aware of other key safety awareness information that he used daily in his work. It was established, and the applicant in fact conceded that he was aware of the Respondent's safety procedures and policies. Further he was aware of the respondent's stated target of achieving zero fatalities in each cycle of 365 days.

[14] The applicant's defence appears to be as follows. Firstly, it is that he was off duty but just on stand by. Consequently he was at his house and was not required to attend to the workplace unless there was a technical problem that required his expertise; that he had not been called to attend to a technical query but had voluntarily gone into the factory and to where the team wa.s working with Hermon Msibi, seeking to rig or bring down to the ground the gearbox; and that because he had not come to the work place to attend to a technical query, the working team was led by Hermon Msibi and Desmond Mabuza who were jointly responsible for ensuring that all safety protocols were adhered to.

[15] Secondly, and in line with the first reason, the applicant intimated that because he had not been called in for a technical problem then it was not his responsibility to prepare a new Safe Work Permit given that the scope of the work had changed from fixing the gearbox at its position to rigging the gearbox. It was his evidence and submission that both Hermon Msibi and Desmond Dube were responsible for preparing and filing a new safe work permit. In his submissions the applicant insisted that the team of Hermon Msibi and Desmond Dube were competent to handle safety standards and procedures during the operation, secondly, they had jointly co-signed the Safe Work Permit that prescribed the safety issues involved in the previous scope of work which had now changed. Finally that, being aware that the grating was to be open, it was both Msibi and Mabuza's responsibility to ensure that the area in which the team was working was properly demarcated and that the team members were adhering fully with the required safety protocols and standards.

[16] It is common cause that on applicant's arrival at the factory he found his team working without adhering to safety protocols. In this regard, the team working at height to remove the gearbox was not using

harnesses nor was the area in which they were working demarcated with tapes. This was despite the fact that the gearbox cover had already been removed and the gearbox itself was to be rigged to the floor. It is also common cause that a fatal accident occurred in the working area that had not been demarcated as required by the health protocols.

[17] It is common cause that the applicant was aware of the respondent's several safety protocols and was aware that the respondent had embarked on a zero accident drive as a result of numerous accidents that had happened on the factory floor. In terms of these safety protocols it was incumbent upon management to ensure that unsafe conditions are made safe and that unsafe acts by employees are stopped. The applicant was fully aware of these responsibilities on him as Manager.

[18] As apparent from the preceding paragraphs, there is a dispute as to why applicant came to the factory on 27th June 2015. He claims he had not been brought to the factory for technical reasons but to organise food and a substitute team for the team on site while the

respondent alleges he was obliged to come to the factory after being told of the change of scope of work since it was a technical complication.

[19] It matters not why the applicant came to the factory on the fateful day. Having arrived on site and having found his team not following the safety protocols, it was incumbent upon the applicant to call the team to order in that respect. The gearbox cover had been removed and was on the platform floor more than 2 metres from the ground. It was clear that it would have to be brought to ground and that the gearbox itself would have to be rigged to the floor. Applicant saw that team members were not wearing harnesses despite working at height. Further the work site was not demarcated at all. As a manager with his level of responsibility, even if the applicant had been on leave, he would have had the duty to call out the non-compliance with safety protocols once he became aware of them. This responsibility does not go away simply because he was on standby - once he is on site and he notices non-adherence to safety protocols, he must, in line with the fall protection plan and other safety protocol plans, ensure that the employees are following the safety protocols. Clearly on the evidence led before Court and on the evidence raised from cross examination,

the applicant breached existing protocols by failing to ensure that employees who were working without adhering to these stopped doing so and by failing to ensure that unsafe conditions were made safe.

[20] The respondent has proved to our satisfaction that it had a fair reason for terminating the applicant's employ following his failure to ensure that the team worked within a safe environment as required by the respondent's safety protocols. It remains to be considered whether the respondent has proved on a balance of probabilities that the applicant's misconduct justified dismissal.

[21] The applicant complains that the chairman of the disciplinary enquiry took into account irrelevant facts and considerations in the whole case and ultimately dismissed the applicant not for dereliction of duty per se but for other reasons for which he was not accused of, including the death of Bongani Dlamini and also for Gross Negligence of Duty/recklessness.

[22] It is correct that the applicant was not charged for the death of Bongani Dlamini. The death of Dlamini though was a relevant factor in the

applicant's disciplinary enquiry. It is not unreasonable to conclude that

had the working site been demarcated as per the requirement of the respondent's safety protocols, the accident that led to the death of Bongani Dlamini would most likely have been avoided. This then would make any incident arising from the failure to adhere to safety protocols, and, in this particular case, the death of Bongani Dlamini a relevant factor for purposes of considering the culpability of the applicant.

[23] It is also correct that the chairman of the disciplinary hearing when delivering the verdict and sanction stated that the applicant had faced charges of gross negligence of duty/recklessness and thus found him guilty of two counts of it instead of 3 counts of gross dereliction of duty that he faced.

The applicant submitted that the charge of dereliction of duty was less serious and does not attract the sanction of dismissal for first offenders.

[24] According to the respondent's **Industrial Relations Policies and Procedures at article 1.2** -

"Where an employee is negligent or deliberately fails to perform assigned task this shall be deemed to be dereliction of duty.

LEVEL 2.

Gross Negligence of duty/recklessness is described at **article 6.5** thus

"Any employee whose actions or lack of actions result in loss of production damage or inquiry shall be subject to disciplinary enquiry."

LEVEL 2.

Level 2 is a level of discipline described in the company documents as being major/serious misconduct. A breach of level 2 rules are considered serious.

Having had regard to the document on policies and procedures it seems clear that both dereliction of duty and gross negligence of duty are seen as serious acts of misconduct. It seems to us that in the circumstances of this case the applicant suffers no prejudice with the chairman's use of the words Gross Negligence of duty/recklessness. The two misconducts include a negligent or deliberate refusal to perform assigned tasks and are both taken to be serious cases of misconduct. It is also to be remembered that applicant's misconduct was said to be gross. In his book

Dismissal, Discrimination and

Unfair Labour Practices, John Grogan at P312 states that *"to warrant dismissal negligence by an employee must be gross. Negligence* may *be said to have occurred if the employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself. The term "gross negligence" in employment law...* may *be taken to mean negligence that 1s particularly inexcusable."*

Regard being had for the negligent element in cases of dereliction of duty, it is not unreasonable to import this meaning to the term *"gross dereliction of duty."* That is to say, dereliction of duty that is particularly inexcusable.

This finds favour from the case of **Nampak Corrugated Wadeville v Khoza 1999 (20) ILJ 578** cited by the respondent, where at the Court held that the respondent employee's conduct in abandoning the first boiler was gross dereliction of duty. The Court ultimately found that the employee was given the correct sanction (dismissal) in the circumstances.

[25] The applicant further submitted that the chairman of the disciplinary responsibility enquiry incorrectly believed that the applicant refused

to

take responsibility for this actions and caused the hearing to be delayed by 7 months.

It appears to us that the applicant misconstrues the Chairman's (RW1) state of mind. In the applicant's evidence before Court, he was adamant that he had left the worksite in the adequate hands of Desmond Mabuza and Hermon Msibi and that these two were competent to deal with all safety issues that may arise therein. This was despite that he being the most senior employee to have come to the site, had seen that safety measures were not being adhered to. It was put to him that unsafe acts were to be stopped by a Manager; that he was expected to have stopped the team when he discovered they were working without harness and at a height of over 2 metres. His response was that *"according to the procedure it was supposed to be so."*

When told he was to have ensured that the employees adhered to the safety protocols he answered that it was the responsibility of all of them to ensure safety protocols were followed, going forward. All of them being Manager plant owner and the artisans.

R1's evidence was that the applicant consistently refused to acknowledge his responsibility for the failure to adhere to safety

procedures, insisting that it was the plant cover that was responsible from the above that even before this Court, the applicant sought to minimize his role in the whole issue. That cannot be overlooked by the hearing chairman nor can that be overlooked by this Court.

In our view, the Chairman's concern about the lack of remorse by the applicant goes to his failure to take some responsibility for the events of the 27th June 2015 that led to that tragic accident. He was entitled, as were are to question the *ban tides* of the applicant in this regard.

[26] The determination of an appropriate sanction is a matter that is largely at the discretion of the employer. The employer is only expected to exercise that discretion fairly. Looking at the circumstances of this matter, the applicant was the most senior manager at the working site; he became aware of the employees not adhering to safety protocols; he was aware that the respondent had had a spate of accidents due to failure to adhere to safety protocols and had undertaken a deliberate route to enforce such protocols in order to minimise accidents; he was aware of the importance of his role as Manager in enforcing the safety protocols; the reasons he gives for not ensuring his teams safety - that

he had not been called for a technical difficulty confirm that he

neglected his duties. Whether it was gross negligence or gross dereliction of duty it appears to us that the applicant simply failed to carry out his managerial duties and hoped that the plant owner would do so. We cannot find fault with the employer's finding. The employer was, in our view correct to dismiss him. ·

Procedural Unfairness

[27] With regard to procedure, the applicant raises three issues. The first is that the initiator also played the role of being a witness. Further the applicant was asked to enter his defence and give his evidence before the employer closed its case.

Secondly the applicant complains that he was picked unfairly for discipline while Mr Desmond Mabuza and Mr Hermon Msibi, who were also responsible for safety were not disciplined; that Hermon Msibi and Desmond Mabuza had both been on duty on 27th June 2015 yet despite the respondent's zero tolerance policy to non-adherence to safety procedures.

Thirdly he complains that the Chairman irregularly measured the height from the grating area to the platform (where the R2 strike receiver gearbox had been) and the used those measurement to

make a factual

finding that applicant had been dishonest in his evidence regarding the height concerned.

[28] It is common cause that the applicant gave his evidence before any of the initiator's witnesses did so. He was then cross-examined. Thereafter the initiator called his witness. The applicant's attorney submitted that this anomaly coupled with the fact that the initiator also played the role of witness rendered the hearing procedurally unfair. He cited the case of **Menzi Ngcamphalala v Swaziland Building IC Case No. 50/2005** as authority for this submission.

[29] The respondent's attorney implored the Court not to allow the technical lapses to overshadow the respondent's case since the hearing was held by lay persons in a situation where the disciplinary procedure had been agreed to by the stakeholders.

[30] The Court may make due allowances for procedural lapses in disciplinary hearings conducted by lay persons. In this matter, the applicant as in the **Menzi Ngcamphalala** matter, was made to testify before he heard what the respondent's witnesses had to say about

him.

This compromised his defence and caused him real prejudice in the conduct of his defence.

[31] The applicant, as an employee being taken through a disciplinary hearing was entitled to a procedurally fair hearing. The procedure undertaken by the respondent had the potential of allowing the initiator to tailor the evidence of his witnesses to counter the defence already given by the applicant, whereas it is for the initiator to lay his case before the defence gives evidence. That procedure was clearly prejudicial to the applicant and cannot be waived off as a mere technicality. As stated in the **Graham Rudolph v Mananga College and Another IC Case No. 97/2007,** *"natural justice is* a *process of value in itself It is an end in itself"* **(Tfwala v ABC Shoe Store (1987) 8 ILJ 714 (IC)).**

[32] For the reasons set out above we find that the applicant's dismissal was procedurally unfair. In the circumstances it is not necessary to pronounce on the other issues raised by the applicant challenging the procedural fairness of his dismissal.

[33] Because the applicant's dismissal is unfair only because of procedure he is not entitled to reinstatement and having considered his circumstances and the circumstances of this matter we are of the view that an award of four month's wages as compensation is adequate compensation to the applicant. We therefore make the following order:

1. **Judgement is entered against the respondent for payment of applicant as follows:**

   4 months' salary as compensation - E 22.940.10

   X4

   E 91760.40

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S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: S.M. Simelane (SM Simelane & Co).

For Respondent: Mr Z. Shabangu (Magagula & Hlophe Attorneys)