IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 252/2019

In the matter between:-

LEVY KHANYA MAMBA Applicant

And

SWAZI MED CENTRE (PTY) LTD Respondent

Neutral citation: Levy Khanya Mamba v Swazi Med Centre (Pty) Ltd (252/2019) [2022] SZIC 67 (01 June, 2022).

Coram: **THWALA – JUDGE.** (*Sitting with Mr M.T.E. Mtetwa and Mr. A.M. Nkambule, Nominated Members of the Court*).

HEARD : 10th December, 2021.

DELIVERED : 01st June, 2022.

JUDGEMENT

INTRODUCTION

[1] Applicant is a former employee of the Respondent where he was employed as a stock controller, initially on a fixed-term contract and then later on a permanent basis.

BACKGROUND FACTS

[2] The pleadings reveal that two (2) distinct sets of disciplinary hearings were held, by the Respondent against the Applicant allegedly arising from the same sets of facts, i.e, shortage of stock. Regrettably, no effort was made by either of the parties during trial of the case, to lead any evidence regarding the first disciplinary hearing notwithstanding the fact that in their pleadings both parties did concede that same had infact taken place sometime in July 2017. The Court was only left to deduce from the pleadings the fact that the Respondent did actually arraign Applicant before an initial (first) hearing whose outcome was carried through only to be set aside on appeal on the basis that the chairperson of the appeal declared the initial hearing as irregular, allegedly for failure to observe the *audi* principles. Again, it is regrettable that the chairperson's reasons for the setting aside of Respondent's first disciplinary hearing were not made available to the Court. This failure has deprived the Court from understanding the exact nature of the procedural defect that allegedly occurred during the first hearing. Be that as it may, the above preliminary facts raise a novel point of law, **to wit**: whether an employer can be assisted

to correct a procedural wrong committed by its agent(s) against an employee in the course of a disciplinary hearing?

[3] Whilst we are alive to the fact that the above legal question was not canvassed before us, we are however more than convinced that it was improper of the appeal chairperson to abrogate from his duty of acting impartially and to then proceed to be an advisor to the employer and then advise Respondent to reconstitute another disciplinary hearing. Such decision was tantamount to affording Respondent the proverbial "second bite at the cherry", an act which clearly has no justification under our labour law. More specifically, we could not help but note that the chairperson of appeal made a finding which even this Court could not do if these same set of facts were placed before it. In fact, our law is clear that a dismissal is procedurally unfair if the employer has failed to follow a set of processes and procedures. Where the Court has come to the above conclusion, then the game must, without any further ado, end in favour of the employee. If the Industrial Court is, by law, enjoined to find in favour of the employee in such circumstances, then there can be no any other alternative room for an appeal chairperson. Obviously, the above position would only prevail where there is no laid down disciplinary code that is established in a collective agreement between the employer and a duly recognised worker's representative.

[4] The above finding of the Court cannot however, be said to be the end of the matter because during the trial, this Court was granted the opportunity to hear the basis of each of the parties' case and/or defence, on the strength of which we are now being called upon to make our own determination. In the case of **Central Bank of Swaziland v Memory Matiwane ICA No. 110/1993,** the Industrial Court of Appeal held that:

The court *a quo* does not sit as a court of appeal to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it. It is the duty of the Industrial Court to enquire on the evidence placed before it, as to whether the provisions of the Industrial Relations Act and the Employment Act have been complied with, and to make a fair award having regard to all the circumstances of the case. (Underlining is ours).

Applicants Case

[5] Indeed, both in his evidence in-chief and under cross-examination, Applicant was ready to concede that he had regularly effected alterations to Respondent's stock-in-trade as reflected in the company's computer system. What became a triable issue therefore was whether he (Applicant) had his immediate supervisor's permission to do so. For his part, he contended that he had such authority after it was verbally passed on to him by his immediate supervisor, a certain Mr. Okuchuku Mbachu, who was Respondent's Operations Manager. This point marked the pivot of this case and was to be determined upon due consideration of Mr.Mbachu's testimony before us.

[6] It is worth mentioning that in his pleadings, Applicant had allegedly based his case of unfair dismissal on the basis that it lacked both substantive as well as procedural fairness at law. However, during his evidence in-chief, Applicant's emphasis shifted onto the basis that the dismissal lacked any substantive basis at law. He was adamant that the stock adjustments were done by him with the express consent and knowledge of his supervisor. He concluded his evidence by praying for the relief as contained in his notice of application.

Respondent's case

[7] For his part, Respondent paraded Mr. Okuchuku Mbachu(RWI), who went on to confirm both his position within Respondent as well as the relationship of his position with that of the Applicant. Indeed, the fact that Respondent was suffering stock shortages was an undisputed fact between the parties. The only issue that remained for RWI, to assist the Court with was why were these stock shortages being regarded as a misconduct committed by Applicant, especially in light of Applicant's justification for same. As already alluded to under paragraphs above, in the grand scheme of things, Applicant conceded to having regularly gained entry into Respondent's stock control system. Here we pause to mention that it was common cause that Applicant's 'entry' into Respondent's stock control system, was specifically for the purpose of making adjustments thereon, which adjustments were beyond the scope of his mandate. Hence, his allegation to the effect that permission for same had been granted by RWI.

[8] In his evidence, both in-chief and under cross-examination, RWI was steadfast in denying Applicant's assertion. Indeed, RWI went on to give narrations of the effort and trouble which the Company was forced to undergo in order to identify the leakages which resulted in the loss of stock running into hundreds of thousands. And having had the benefit of having both Applicant and RWI testify before us, we are more than comfortable to go along with RWI's version of events. As a witness, RWI gave his evidence very eloquently and clearly as against Applicant who was wavering and unsure. Most noticeably, Applicant was unable to state the date and/or the circumstances under which RWI came to hand-over to him the 'password' that enabled him (Applicant) to perform functions that ordinarily fell under the exclusive scope of RWI as the Company's

Operations Manager. It is common cause that Applicant's 'entries' into the system (which he confirmed) were random, in which case, the Court expected Applicant to go full stretch in explaining the facts and/or circumstances which obtained-in respect of each 'entry'-to justify his conduct. The story of a 'blanket delegation of RWI's administrative authority' which Applicant averred before us was too fanciful to be believed.

[9] In the result, it is our considered view that Respondent has discharged the duty bestowed upon it by **Section 42(2) of the Employment Act**, in proving that in all the circumstances of this case, it was fair and reasonable to terminate Applicant's services.

Applicant's application is therefore dismissed in its entirety with no order as to costs.

The members agreed.

M. M. THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : Mr. Ephraem Dlamini.

FOR RESPONDENT : Mr. L.M. Simelane of L.M. Simelane Attorneys