IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 243/2018

In the matter between:-

IAN DUBE **APPLICANT**

AND

POTS CONSTRUCTION **RESPONDENT**

Neutral citation *Jan Dube v Pots Construction (243/2018) [2021] SZJC 78 (18 November 2021)*

CORAM **DLAMINIJ,**
*(Sitting with **A.S. Ntiwane** & **S.P. Mamba** Nominated Members of the Court)*

Last heard **02 November 2021**

Judgement Delivered **17 February 2022**

Summary: *Labour law - Unfair Dismissal: Applicant charged and taken through a disciplinmy hearing on charges of assault and negligence. Evidence indicating that Applicant did assault a fellow employee. Evidence also indicating that Applicant was negligent in respect cf a motor vehicle accident. Held: Dismissal qf the Applicant in casu was procedurally and substantively fair-Applicant's application accordingly dismissed.*

I. Ian Dube is the Applicant in this unfair dismissal claim. He has approached this Court for relief, claiming unfair dismissal against his former employer - Pots Construction, the Respondent in these proceedings. Dube was initially employed by the Respondent in December of the year 2013, as a Senior Site Agent, and worked continuously for the Respondent until he was dismissed in December 2016, following a disciplinary hearing. He complains that his dismissal was both procedurally and substantively unfair, hence now his claim for compensation.

2. In evidence, the case of the Applicant was as follows; he was initially employed by the Respondent as a Site Agent. He rose through the ranks until he held the position of Senior Site Agent, which was the position he occupied at the time of his dismissal. Even though he was engaged on a contractual basis, he says his service was uninten-upted until his dismissal in mid - December 2016. At the time of his dismissal, he says he was now earning a monthly salary of El 8,000 (Eighteen thousand Emalangeni)

3. Testifying on the circumstances that led to the termination of his services, the Applicant informed the Court that he was allocated a company vehicle to use in the daily execution of his duties. He went on to inform the Court that on 06 December 2016, he was involved in a motor vehicle accident with the vehicle in question. He blames the vehicle's dysfunctional brakes as the sole cause of the accident. It was the Applicant's further evidence that he had previously reported the faulty brakes of the vehicle to his superiors but had been told to continue using it because there was no money to fix the faulty brakes. As a result he says he continued using the vehicle despite his misgivings about doing so.

4. About 3 days after the accident, the Applicant says he was then slapped with charges relating to the accident in question and also for allegedly assaulting his colleagues. The Applicant says the assault charge was a fabrication against him as he never assaulted any of his colleagues. However, he says at the conclusion of his hearing he was dismissed. He appealed the decision to dismiss him but was unsuccessful, hence now this present claim for determination by this Court.

5. Under cross examination by the Respondent's Attorney, it emerged that the motor vehicle accident, for which the Applicant was charged, occurred at Mangwaneni during his lunch hour and that police investigations revealed that his (Applicant) negligence had been the sole cause of the accident. When questioned why he decided to use the vehicle, knowing that it had a faulty breaking system, he informed the Court that he was forced by the Workshop Manager to use the

vehicle.

6. In relation to the assault charge, the Applicant insisted that this charge was a fabrication because he did not assault any of his colleagues. The Court though noted that his denial about assaulting his colleagues contradicted his letter of appeal in which he stated that he did not assault his colleagues to the degree they claim he did. When this was brought to his attention, the Applicant informed the Court that there was some contact with his colleagues, not that he assaulted them though. That in a nutshell was the Applicant's case.

7. First to testify in support of the Respondent's case was Sanele Mashwama. He introduced himself as the Managing Director and

founder of the Respondent. He confirmed that the Applicant was previously employed by the Respondent before his dismissal in December of 2016, following a disciplinary hearing. It was Mashwama's evidence that in December of 2016, during a staff Christmas party, the Applicant assaulted his co-workers namely, Khoza and Sithole who were employed as Security Guards. Apparently, the Applicant became violent at the end of year party and when the Security Guards tried to calm him, he became violent and assaulted them.

8. Then in relation to the motor vehicle accident charge, Mashwama informed the Court that the Applicant was facing a charge for damaging the company vehicle in that he had been involved in an accident in which the vehicle overturned and that the accident was as a result of his negligence. He also testified that the Applicant was not on official company business when the accident occmTed, instead he was on his own private errands, he had gone to see his girl friend. Mashwama also infonned the Court that the Applicant was charged for negligent driving and for driving an unroadwmthy vehicle by the Police following the accident. According to Mashwama, the Applicant

was not supposed to drive the vehicle at all since he says it had a dysfunctional breaking system. Instead he says he ought to have waited for the vehicle to be serviced and repaired before driving it.

9. It was the further evidence of Mashwama that the hearing of the Applicant was chaired by Maxwell Jele, who was the Commercial Manager of the Respondent. He denies that the chairperson was biased against the Applicant. The outcome of the hearing was a sanction of dismissal. The Applicant is said to have filed an appeal directed to this witness but according to Mashwama an appeal hearing could not be convened because it would not have been fair for him to hear the appeal as he was friends with the Applicant since their days at college.

10. The last witness to testify for the defense was Richard Sithole. He is employed by the Respondent as a Security Guard and was on duty on 09 December 2016 when the Applicant assaulted him. Sithole informed the Court that there was an end of year staff party on the date in question. According to him everything was progressing smoothly when all of a sudden he observed that the Applicant and another employee were involved in some altercation. He went to investigate

and reprimanded them but the Applicant was aggressive and questioned this witness about why he was involving himself in their argument. He informed the Applicant that as Security Guard, he was responsible for the safety and security of all employees at the function.

11. As the Applicant was leaving the premises he found this witness by the gate and rudely questioned him why he had intervened in the altercation between him and the other employee. He then manhandled this witness and punched him with a clenched fist on his chest. Thereafter the Applicant left. Sithole says he called the Police emergency line to report his assault and the police promised to come but never did. He then reported the assault to management and the Applicant was formally charged and taken through a disciplinary hearing where he (Sithole) testified about the assault incident.

12. The Applicant's Counsel, in his closing submissions, contended that the dismissal of the Applicant was both procedurally and substantively unfair. In respect of the assault charge, the contention was that the alleged assault was not established on a balance of probabilities to prove that indeed the offence was committed. In this

regard however, the Court will take into account that the Applicant's own evidence in his appeal letter is that *' ...he did not assault anybody to the degree they claim he did* ... ' The evidence before Court is that the Applicant manhandled Security Guard Sithole and further punched him with a clenched fist on the chest. This was not disputed by the Applicant's Counsel in cross examining this witness. The Applicant himself, in his letter of appeal, does not dispute that he assaulted the employees. He only states that he did not assault anyone to the degree they claim he did. This, in effect, means that even though the Applicant concedes that there was some assault but it was not to the degree they complainant(s) claim it was. It is accordingly a finding of this Court that the Applicant did assault Security Guard Richard Sithole.

13. Author John Grogan in his publication ***Workplace Law, 10 th Edition,*** defines assault as the unlawful and intentional application of force to a person, or a threat that force will be applied. He goes on to clarify that the force can take a number of fo1ms and need not necessarily involve actual application of physical force, so that even threats of violence

suffice as assault. (See: ***Ntshangase v Alusaf (Pty) Ltd (1984) 5 ILJ 336 (IC).***

14. ***Cameron, Cheadle and Thompson*** in their work titled: ***'The New Labour Relations Act: The Law After The 1998 Amendments' at page 144 -145*** state as follows;

> *"A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship ...Fairness* is *a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case - including the action with which the employee* is *charged - are considered.* "

15. As a general workplace rule, employees are not expected to assault other employees in the workplace. Failure by employers to take appropriate action in assault cases results in fear to the vulnerable and defenseless employees, and may result in lack of labour peace and disharmony. The interest of an employer in eliminating acts of violence at the workplace is not only limited to protecting the individual employees but also in ensuring labour peace and harmony which in turn ensures proper morale and productivity. Assault at the workplace is therefore seen as a serious misconduct because of the

harm or potential harm to the victim of the assault. It also has the potential to disrupt workplace harmony.

16. In casu, the conduct of the Applicant in assaulting Security Guard Richard Sithole, was clearly and sufficiently grave to justify that his services be terminated. The Applicant's conduct fell squarely within the meaning of section 36(b) of the Employment Act, 1980. It is therefore a finding of this Court that in this matter the Employer has established that the Employee, Ian Dube, was guilty of assaulting Security Guard Richard Sithole.

17. Then in respect of the second charge of negligence which resulted to the damage of the company vehicle, the uncontroverted evidence is that the Applicant was involved in the accident in question when he had gone to visit his girlfriend using an unroadworthy vehicle. Even the Applicant's own evidence indicates that he was very much aware that the vehicle had a faulty break system. This then begs the question; why would he risk using the very same vehicle when he was aware that it had a breaks system malfunction?

18. To determine negligence, our Courts employ the classic three pronged test as was formulated by ***Holmes JA*** **in** ***Kruger v Coetzee 1966 (2) SA 428 (AD)*** when he stated as follows;

> *"For the purposes of liability culpa arises if-*
> *(a) a diligens paterfamilias in the position of the defendant -*
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
> *(ii) would take reasonable steps to guard against such occurrence; and*
> *(b) the defendant Jailed to take such steps.*
> *This has been constantly stated by this Court for some 50 years.*
> *Requirement (a) (ii) is sometimes overlooked.*
> *Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.*
> *No hard and fast basis can be laid down.* "

19. Clearly, the Applicant was negligent in using a vehicle that he was well aware had a break system malfunction. He ought not to have used the vehicle until the breaks had been repaired. He ought to have foreseen that in using this faulty vehicle there was a high possibility that he could be involved in an accident. Certainly, a reasonable man would have foreseen the high possibility of an accident occurring in using a vehicle with a faulty break system and would therefore not even have driven a vehicle in this condition. It is accordingly a finding of this Court that the sanction of dismissal in the present circumstances, in respect of both offences the Applicant was charged

with, was both fair and reasonable and appropriate. His dismissal is justifiable according to the requirements of equity and fairness when all the relevant features and circumstances of this case are taken into consideration. On that basis therefore, the finding of the Court is that the dismissal of the Applicant was substantively fair.

20. On the procedural aspect of his dismissal, the totality of the evidence before Court indicates that the Applicant was aware and had been informed of the following rights; he was informed of his right to representation, his right to call witnesses, his right to cross examine witnesses, his right to state his case. This all indicates that the disciplinary hearing of the Applicant was initiated following fair procedures. Even though he was also informed of his right to appeal, the Respondent's Managing Director informed the Court that same could not be convened because of his relationship with the Applicant. He felt that he could not be impartial in deciding the appeal hearing. The mere fact that an appeal hearing was not held does not necessarily amount to procedural unfairness or vitiate the whole disciplinary process. It is accordingly a finding of this Court that the dismissal of the Applicant was procedurally fair as well.

21. In conclusion therefore, it is a finding of this Court that the Respondent in this matter, Pots Construction (Pty) Ltd, has proved that the dismissal of the Applicant, Ian Dube, was initiated following fair procedures. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. The Respondent in this matter has proved that the probabilities of the employee being guilty are greater than the probability that the Employee is not guilty, hence the finding of the Court as well that the dismissal of the Applicant was also substantively fair.

22. In view of the aforegoing the Court accordingly makes orders as follows;

a) The claims of the Applicant against the Respondent be and are hereby dismissed.

b) The Court makes no order as to costs.

The members agree.

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.DLAMINI
UDGE - INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 17th DAY OF FEBRUARY 2022.

For the Applicant	*Attorney Mr.* S. *Zwane (Sithole & Magagula Attorneys)*
For the Respondent	*Attorney Mr. M Mthethwa (C.J. Littler & Company)*