

**IN THE INDUSTRIAL COURT OF SWAZILAND**

Case No 102/2021

In the matter between:

**SABELO MSIMANGO**

Applicant

And

**UMTFOMBO WEMPHILO (PTY) LTD**

Respondent

**Neutral citation:** Sabelo Msimango v Umtfombo Wemphilo (Pty) Ltd (102/21)  
[2022] SZIC 89(14 July 2022)

**Coram:** **NGCAMPHALALA AJ**  
*(Sitting with Mr. M.P. Dlamini and Mr. E.L.B Dlamini,  
Nominated Members of the Court*

**Date Heard:** 05<sup>th</sup> May, 202

**Date Delivered:** 14<sup>th</sup> July 2022

*SUMMARY – Ex parte Application for determination of unresolved dispute- Applicant alleging that his services were unfairly terminated by the Respondent- Applicant’s evidence undisputed due to employer’s failure to attend Court proceedings.*

*Held – The Applicant’s evidence meets the standard required for a grant of the relief sought – Application accordingly granted.*

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**JUDGMENT**

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- [1] The Applicant is Sabelo Msimango, an adult Liswati male of Mangweni in the Hhohho district, a former employee of Respondent.
- [2] The Respondent is Umtfombo Wemphilo Farmers, Ltd, a limited entity with the capacity to sue and be sued in its own name, duly registered and incorporated in accordance with the company laws of Eswatini carrying business at Mangwaneni, in the Hhohho Region.
- [3] The present application is one for a determination of an unresolved dispute in terms of **Section 85 (2) of the Industrial Relations Act 2000 (as amended)**. This section provides that:

*“If the unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement or re-engagement of any employee either party to such a dispute may make an application to the Court for determination of the dispute, or if the parties agree, refer the matter to the Commission for determination.”*

- [4] In the context of labour disputes, an application in terms of **Section 85 (2) of the Industrial Relations Act 2000 (as amended)** is the equivalent of a summons and once the pleadings are closed, the matter is referred to trial where all the parties are expected to present oral, documentary or other legally acceptable evidence in support of their version respectively.
- [5] The present application, though initially opposed by the Respondent through filing of the normal opposing papers, was however not opposed at the trial stage. Prior to directing that the matter be referred to trial on an *ex parte* basis, the Applicant’s Representative was directed to prepare a notice of set down and have same served on the Respondent attorney. The notice

of set down was served at Respondent's attorney of record on the 12<sup>th</sup> April, 2022 for trial on the 13<sup>th</sup> April, 2022.

- [6] The Respondent was thus clearly aware that the matter will be proceeding for trial on the 13<sup>th</sup> April, 2022 as per the notice of set down but elected not to attend court in order to present its version of the events leading to Applicant's dismissal. The matter was postponed to the 26<sup>th</sup> April, 2022 on which date the matter did not take off due to the unavailability of the Applicant. The trial eventually proceeded on the 5<sup>th</sup> May, 2022 on an *ex parte* basis and judgment was reserved.

### **APPLICANT'S TESTIMONY**

- [7] The Applicant's testimony was that he was employed by the Respondent as Team Leader on a permanent basis on the 15<sup>th</sup> May, 2014, until his services were terminated in November, 2020. The company at the time was duly represented by one Mr. Francis Msibi, who was the farm manager. It was his evidence that at the time of dismissal he earned a monthly salary of-E3, 185.81 (Three thousand one hundred and eighty-five Emalangeni Eighty-one cents).

[8] The Applicant testified that on the 21<sup>st</sup> September, 2020 he received a telephone call from a police officer based at Buhleni Police station, who invited him for questioning. It was his evidence that he proceeded to the police station wherein he was advised that the Respondent's chairperson had reported that 73 bags of manure valued at E30, 000.00 had been stolen from its storeroom. It was alleged that he was involved in the theft of the bags of manure.

[9] It was his testimony that he advised the officer that he was unaware of the theft. He was released to go home, and informed that he may be required by the police in future as they were still investigating the matter.

[10] On the 28<sup>th</sup> September, 2020, whilst at work he averred that he received a letter of suspension together with a letter inviting him to an internal an internal disciplinary hearing. The said hearing was held on the 15<sup>th</sup> October, 2020 at Respondents premises. During the hearing he represented himself, whilst the Respondent was represented by Mr. Thobani Masondo and the chairperson was Mr. Bongumenzi Mkhonta.

[11] It was his testimony that during the internal hearing he was found guilty by the Chairperson and a recommendation for his dismissal was made. Upon the pronouncement of his guilt, he proceeded to file a notice of appeal with the Respondent, and he was accordingly invited to an appeal hearing. However, his appeal was dismissed by the Respondent through a letter dated 19<sup>th</sup> November, 2020. It was Applicant's submission that his dismissal was both substantively and procedurally unfair in that he was not afforded a fair hearing. It was his evidence that prior to him being called to a disciplinary hearing he was never engaged by the Respondent to explain, whether he was aware of the theft of the 72 (seventy-two) bags of manure or not.

[12] It was his evidence that on the day of the alleged theft on the 20<sup>th</sup> August, 2020, he worked his usual shift from 6am to 3pm in the afternoon. At knocking off time he proceeded to leave the storeroom key where the manure is kept with Mr. Mandla Thwala as was the norm. On the 21<sup>st</sup> August, 2020 he received a phone call from his manager in the afternoon, advising him to return the storeroom keys and to further explain on the theft of the manure.

[13] It was his evidence that this puzzled him but he proceeded to work on the 22th April, 2020, whereat he was told together with Mr. Thwala to take out all the bags from the storeroom and to further proceed to count the bags. Upon completion of the task assigned the keys to the storeroom were then taken by farm manager. It was his explanation that there were two sets of keys that lead to the storeroom. Further that one set of keys had been misplaced, and he had proceeded to advise Ms. Busie Ntshalintshali the Clerk of the lost keys, this was before the incident, however no action was taken to replace the keys.

[14] It was his testimony that he was not the only one who had access to the keys, as Mr. Thwala also had access to the keys. The only keys which were fully under his supervision were those keys wherein medicine was stored which medicine included pesticides. Therefore, he averred that his dismissal was procedurally unfair in that he was not afforded an opportunity by the Respondent to state his side of the story during the internal disciplinary hearing. He was not afforded an opportunity to mitigate to the charges upon the chairperson issuing out his ruling of guilty instead the Respondent followed the Chairpersons ruling/ recommendation by proceeding to dismiss him. Further it was his testimony that his dismissal was

procedurally unfair in that the Chairperson of the appeal hearing advised that he represented Mr. Mzizi's Respondents attorney, and that all submission would be forwarded to Mr. Mzizi for consideration and were not prepared by the chairperson. The chairperson therefore didn't file any recommendation, but the recommendation to dismiss him on appeal was done by the Respondents attorney Mr. Mzizi.

[15] In support of the substantive fairness of the dismissal he averred that the chairperson of the disciplinary hearing was biased, in that he allowed the evidence of Mr. Elphas Mahlalela, Mr. Mandla Thwala and Ms. Busisiwe Ntshalintshali, whilst the witnesses were not under oath when giving their testimony. Further the Respondent failed to prove its case against him in that it failed to link him to the crime, and further establish that at the time of the theft he was in possession of the storeroom keys. Therefore, there is no evidence linking him to the alleged offence, nor evidence linking him to assisting anyone in the theft of the manure. As a result, thereof his dismissal was both procedurally and substantively unfair.



[16] The Applicant has now brought this application before Court seeking that the Court declare the termination of his services to be unlawful and accordingly should be set aside, and that he be accordingly compensated.

### ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[17] The evidence presented by the Applicant clearly shows that he was an employee to whom **Section 35 (1) of the Employment Act 1980** applied. In dismissal proceedings, the onus is on the employer to show that the dismissal was fair and reasonable as set out in **Sections 36 and 42 of the Employment Act, 1980**. In this regard, **Grogan J, Workplace Law (9<sup>th</sup> Edition) at page 123** states that:

*“Proof that the dismissal was fair requires the employer to prove on a balance of probabilities that the employee in fact committed the misconduct, or was incapacitated to the degree alleged, as the case may be. The employer must also prove that it complied with the procedural requirements of the type of dismissal concerned... the primary significance of the onus is that when the evidence on a point is evenly balanced or*

*indecisive, the balance will tip against the party upon whom the onus rests.”*

[18] On the Applicant’s unchallenged evidence, it was his evidence that he did not commit the offence as charged, and that no evidence was adduced by the Respondent to link him to the offence. The Applicant denies that he committed the offence.

[19] We are satisfied that the Applicant was able to discharge the onus resting on him which was simply to demonstrate that his services were terminated by the Respondent. The undisputed evidence of the Applicant also shows that the dismissal was unfair and unreasonable in the circumstances of the case. In these circumstances, and in the absence of any explanations or justification for the Applicant’s dismissal from the Respondent, we find that the termination of the Applicant’s services was both procedurally and substantively unfair and he must be compensated accordingly.

The Court accordingly makes the following orders:

The Respondent is ordered to pay to the Applicant compensation as follows:

(i) Notice Pay in the sum of E 3,185.81

(ii) Additional Notice in the sum of E 2,450.60

(iii) Severance Pay in the sum of E 6,125.50

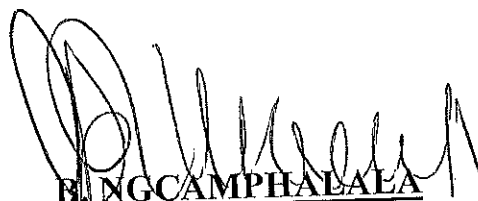
(iv) 8 months' compensation in the sum of E 25,486.48.

**Total Award**

**E 37,248.39**

(v) There is no order as to costs.

The Members Agree.



B. NGCAMPHALALA

**ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND**

**For Applicant:** Mr. F. Vilakati (Mongi Nsibande & Partners).

**For Respondent:** No appearance.