



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 554/2006

In the matter between:-

DAN MASUKU

APPLICANT

AND

SWAZILAND PLANTATION LIMITED

RESPONDENT

Neutral citation: *Dan Masuku v Swaziland Plantation Limited (554/2006) [2016] SZIC 51 (25 October 2016)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heard : **19 JULY 2016**
Delivered : **25 OCTOBER 2016**

Summary: *Labour Law - Unfair Dismissal – Applicant alleges unfair dismissal by Respondent following by a disciplinary enquiry. Held – All cases of alleged unfair dismissal are assessed on the basis of two criteria; substantive and procedural fairness. Held – In Casu the Respondent Employer has proved that the dismissal of Applicant procedurally and substantively fair. Held – Application accordingly dismissed.*

1. The Applicant, Dan Masuku, is a former employee of Swaziland Plantation Limited, the Respondent in these proceedings. His evidence was that he started working for the Respondent in 1987 until December 2004, when he was unfairly dismissed. He now claims against the Respondent company the following; payment of his terminal benefits and maximum compensation for the unfair termination of his services. The Respondent company on the other hand vigorously opposes the claims of the Applicant, contending instead that his dismissal was procedurally and substantively fair, hence it feels it is under no obligation to pay Masuku's claims. The matter is now before this Court for determination of this dispute of the parties.

2. The case of the Applicant, according to his testimony, can be summarised as follows; he was employed by the Respondent in 1987, and not 1994 as reflected in his salary advice slip. On the 01st December 2004, he went to work as usual and at around midday he was handed a letter of suspension by his Supervisor, Mduduzi Lukhele. His suspension was pending the outcome of a disciplinary hearing. The suspension letter, which is annexed to Masuku's bundle of documents, spelt out a charge of insubordination against him emanating from an incident in which he had allegedly told his Supervisor to '*fuck off*', when he (Applicant) asked for a new pair of safety

gloves and the Supervisor had informed him to bring a complete pair of similar gloves.

3. The Applicant disputes the allegations against him. He denies that he ever insulted his Supervisor, Lukhele, instead he states that he never said anything to him, let alone an insult or abusive words. Under oath, he informed the Court that he was still surprised at the turn of events, and that he was even more baffled when he received the suspension letter, especially because even his Supervisor had informed him that he also was not aware of the suspension letter.

4. At his hearing though, his Supervisor insisted that he had insulted him and when the Applicant questioned him (Supervisor) as to who his witnesses were, Lukhele failed to bring forth any witnesses who could corroborate him in these serious allegations against the Applicant. The Applicant further testified that his witness was a certain Nathi, who however he was not given an opportunity to call despite his desire to have him testify in his defence. After his hearing on 02 December 2004, he received a letter terminating his services the next day on 03 December 2004. In terminating his services the Respondent apparently considered the fact the Applicant had a final written

warning, which however Mr. Masuku contended that he could not recall what it was for or even if it actually existed. When his Attorney referred him to document 'R1' at page 1 thereof, Mr. Masuku denied ever being charged in February 2004 with insubordination following an incident in which he allegedly refused and/or failed to obey a lawful and reasonable instruction. Then in respect of the December 2004, incident of insubordination, the Applicant disputed ever appearing before a Mr. Fritz for his hearing, stating instead that his hearing was chaired by a certain Mr. Magongo. He also denied having requested that the initial Chairperson of his December 2004 hearing, Phineas Dlamini, should recuse himself from his hearing. According to Masuku, he was learning about all this for the first time here in Court. After his dismissal his union appealed against the decision to dismiss him to the Labour Department but was unsuccessful hence the matter is now before this Court for determination.

5. Under cross examination by the Respondent's Attorney, Attorney Mr. B. Gamedze, the Applicant maintained that he appeared before the disciplinary tribunal on 02 December 2004 and was dismissed the next day. He denied that his hearing was postponed on the 02nd December to the 06th December after his representative had applied that Phineas Dlamini recuse himself.

When asked to produce the letter dated 03 December terminating his services, the Applicant stated that he could not locate it and assumed it must have been eaten by rats. When it was brought to the Applicant's attention that his union had unsuccessfully appealed against the decision to terminate his services, the Applicant lamely stated that he was not aware of this fact. Masuku stated as well that he never requested for a new pair of gloves as alleged by Mduduzi Lukhele, stating for the first time under cross examination that in his line of work he never needed to use gloves and therefore had no reason to ask for a new pair from Lukhele. That was the Applicant's case.

6. The Respondent called two witnesses in support of its case, Mduduzi Lukhele and Christopher Fritz. Witness Mduduzi Lukhele testified that he is employed by the Respondent as a Supervisor at the sawmill division of the company in the wet mill department, the same department the Applicant had been employed in. This witness stated further that in the saw mill department it is compulsory that all employees wear protective clothing, i.e. ear plugs, gloves, helmets, safety shoes and dust masks, and this included the Applicant.

7. In relation to the matter that culminated in the dismissal of Mr. Masuku, this witness testified that on 01 December 2004, as he was passing next to a machine the Applicant was operating, the Applicant approached him and requested for a new pair of gloves. Apparently the policy of the company was that in requesting for new safety apparel, employees had to hand in the old ones in order to exchange with the new ones. When requesting for the new pair however, the Applicant handed in an unmatched pair, one was a leather one and the other was a plastic one. When Lukhele informed the Applicant that this was not the pair he had previously given to him, the Applicant threw a tantrum. He told Lukhele to '*fuck off*', and also that he would not be bullied by him as he (Lukhele) was not the owner of the company. As he said this he was advancing menacingly and threateningly towards him. He threw the unmatched pair of gloves at this witness. As he continued threateningly approaching Lukhele, he (Lukhele) felt threatened, turned around and literally fled. Lukhele then decided to report the incident to the union shop steward, a certain Kunene, and the shop steward talked to Masuku about the incident but he did not want to hear anything that was said to him. Instead he continued with his threatening approach and even refused to apologise.

8. Feeling threatened, Lukhele then decided to report the incident to the Production Manager, explaining that he was now scared of working with the Applicant because of this encounter. A decision was then taken by the head of department, Phineas Dlamini, to suspend the Applicant pending a disciplinary enquiry into his conduct. Initially his hearing was slated for 02 December 2004, but it did not proceed because the Applicant's representative wanted to apply for the recusal of Phineas Dlamini as chairperson because he was the one who suspended the Applicant and he accordingly postponed it to 06 December. Indeed on 06 December Phineas Dlamini recused himself from hearing the matter and postponed it to the next day, 07 December, pending the appointment of a new chairperson. On 07 December a new chairperson, Christopher Fritz, was introduced and he postponed the hearing of the Applicant to 10 December for resumption.

9. The hearing finally commenced on 10 December and the charges faced by Masuku were that of insubordination and using insulting language. When the charges were put to him he pleaded not guilty but at the conclusion of his hearing the chairperson returned a verdict of guilty. This witness further pointed out that when the hearing was concluded Masuku then started showing remorse, apologising for his unbecoming conduct. Lukhele testified

that Masuku even went to the extent of conceding that he was wrong and pointed out that he had a good work relationship with this witness.

10. Under cross questioning by the Applicant's Attorney, Mr. Nhleko, this witness maintained his evidence that the Applicant had insulted him and further told him that he would not be bullied or harassed by him as he was not the owner of the company. He further informed the Court that he had no reason to fabricate this whole incident against the Applicant as they had always enjoyed a cordial work relationship. When Mr. Nhleko put it to this witness that Mr. Masuku had indicated that he wished to call a witness by the surname of Kunene, he (witness) stated that the Applicant was informed of his rights, including the right to call witnesses in support of his case, and further that he was represented at the hearing by his union SAPWU (Swaziland Agricultural and Plantations Workers' Union).

11. The second and last witness to testify in support of the Respondent's case was Christopher Fritz. He introduced himself as the Dry Mill Manager at the Respondent's undertaking. He further informed the Court that he recalled the case of the Applicant since he was the chairperson of a disciplinary hearing that was instituted against him, which culminated in the termination of his

services. He clarified that initially the disciplinary hearing of the Applicant was to be chaired by the departmental head, Phineas Dlamini, but since it had occurred in his department and for the fact that he had signed the suspension letter, the union representing the Applicant objected to him (Phineas) chairing the hearing as a result of which he (Fritz) was then appointed to preside over the hearing. His appointment was through the office of the human resource manager. This was so that Mr. Masuku's hearing could be fair. Mr. Fritz further testified that the Applicant was present throughout the whole duration of the sitting of his hearing with his representative and that he fully participated in the process. He was also allowed the right to call witnesses in terms of the company policy. The outcome of the hearing was that Mr. Masuku was found guilty as charged and had his services terminated.

12. Under cross examination, this witness was questioned on why he believed Lukhele's evidence over that of the Applicant and his response was that Lukhele's evidence was more plausible compared to that of Mr. Masuku. Fritz denied being biased against the Applicant.

13. As a starting point, perhaps I should reiterate what this Court has always reminded litigants and their respective representatives that a trial before this Court is a hearing *de novo*. This in essence means that the Court has to conduct its own enquiry into the fairness of the dismissal of the Applicant. This exercise entails considering and determining whether it was reasonable and fair for the Respondent to terminate the services of the Applicant, taking into account all relevant circumstances of the case. All cases of alleged unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. No dismissal will ever be deemed fair if it cannot be proved by the Employer, that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness]. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for instituting the disciplinary hearing against the Employee and ultimately terminating his services. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. So that if an Employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the Employee is not guilty, the dismissal will be deemed to have been substantively unfair. On the other hand, if the Employer is able to prove that the probabilities of the Employee being guilty

outweigh those that he is not, then the opposite is true, that is to say the dismissal will be deemed substantively fair.

14. Now, coming to this dispute for determination, the probable and consistent evidence before this Court indeed indicates that on Wednesday the 01st December 2004, the present Applicant, Mr. Dan Masuku, approached his supervisor with a request for a new pair of gloves. In this regard the policy of the company was that in making such request, the old pair had to be handed in in exchange for the new one. When the Applicant was instructed by the supervisor to hand in the old pair, he went away and came back with an unmatching pair, one leather and the other plastic. The supervisor informed him that this was not the pair that had been previously issued to him, and the Applicant went berserk. He started shouting at his supervisor telling to *'fuck off'*, and he threw the unmatching pair at the Supervisor. He approached him menacingly and the Supervisor, in fear, had to retreat, turn around and flee.
15. For this transgression he was charged, went through a disciplinary enquiry into his unbecoming conduct. The notice addressed to him notifying him to attend the enquiry and spelling out his charges was part of the evidence scrutinised by the Court. It explicitly spelt out his rights, which included the

right to representation, to an interpreter, to call witnesses, to be notified in writing of any communication in relation to same, which included the finding of same. He was also notified that his previous work record would be considered at the end of the hearing and that he was allowed to raise relevant factors to be taken into account in mitigation of sentence. He was also notified of his right to a written verdict and sanction and to appeal against same. It is therefore the finding of this Court that the Applicant went through a procedurally fair disciplinary process.

16. The evidence also indicates that the Applicant was found guilty as charged, and rightfully so, if I may add. Surprisingly, when he was led in evidence by his Attorney and under cross examination by the Respondent's representative he vehemently denied that the incident of 01 December 2004 ever occurred. In fact it would seem that the Applicant's intent was to deny everything before this Court during his trial. He denied approaching his Supervisor for a new pair of gloves, stating instead that in his line of work he never needed gloves and therefore had no reason to make such request. He also denied insulting him. He denied appearing before any Chairperson by the name of Fritz. He denied having a final warning in his record in relation to an incident that had occurred some 10 months before the December 2004

incident. This is despite the fact that the totality of the evidence before this Court all indicates that the Applicant was not being truthful with the Court. Over and above this, he failed to call even a single witness in support of his case. One would have expected that since he is complaining that he was not allowed an opportunity to call witnesses at his disciplinary hearing, then he ought to have called these witnesses in support of his case before this Court. But that was not to be.

17. The minutes of the disciplinary hearing indicate that Mr. Masuku never disputed the fact that he approached his Supervisor, Lukhele, for a new pair of gloves. In fact, the minutes indicate that at the hearing, Mr. Masuku admitted the issue of the request for gloves and that he gave him an unmatching pair because, according to him, they were old. The minutes also indicate that at his hearing Mr. Masuku's testimony was that '*...there was no way I would have worked without gloves.*' The minutes also indicate that Mr. Masuku had wanted to reconcile with his Supervisor. He wanted to apologise. One is therefore left baffled as to why then the Applicant denied everything in this Court? What exactly was he seeking to achieve? The finding of the Court in this regard is that the Applicant was on a mission to deliberately deceive this Court. He set out to put to issue everything he

could, even up to the extent of denying some of the most obvious facts, such as that his hearing was ultimately chaired by Fritz after he had applied for the recusal of Phineas Dlamini. In the totality of things therefore, the finding of this Court is that the referral of this unfair dismissal dispute for determination by the Applicant, Dan Masuku, was speculative and opportunistic and that his case clearly had no prospects of success.

18. As pointed out above, the requirement of our law is that that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. In *casu* therefore, the finding of this Court is that the Respondent, Swaziland Plantations Limited has also proved on a balance of probabilities that the Applicant, Dan Masuku, committed an act of serious misconduct so severe as to warrant his dismissal. In fact, the case of the Respondent is more plausible and convincing than that advanced by the Applicant. The finding of the Court therefore is that the dismissal of Dan Masuku was also substantively fair.

19. In conclusion therefore, taking into account all the evidence and circumstances of this case, the finding of the Court is that the application of for determination of this unfair dismissal matter of the Applicant, Dan

Masuku, is without merit and is accordingly dismissed. This is obviously one matter in which the Court should mark its disapproval of litigants who deliberately set out to deceive the Court so that it finds in their favour. The Applicant was prepared to tell one lie after another even when the truth was obvious to everyone. His mission was for the Court to find in his favour, at all costs, even when confronted with glaring facts of the truth. This the Court discourages. The Applicant informed the Court that since his dismissal he has not been able to secure alternative employment. Had circumstances been different, the Court would not hesitated to order that he pays the costs of suit of the employer. The Court therefore reluctantly orders that each party is to bear its own costs. The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 25TH DAY OF OCTOBER 2016.

For the Applicant : Attorney Mr. H. Nhleko (Dunseith Attorneys).

For the Respondent : Attorney Mr. B. Gamedze (Musa M. Sibandze Attorneys).