IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 19/2018

In the matter between

LINDUMUZI DLAMINI **APPELLANT**

And

ESWATINI WATER SERVICES CORPORATION **RESPONDENT**

Neutral Citation: *Lindumuzi Dlamini v Eswatini Water Services Corporation (19/18) SZHC 07[2019].*

Coram: M Dlamini AJA, D Tshabalala AJA, M Langwenya AJA.

Heard: 16/04/19
Delivered: 02/05/19

For Appellant : D Jele (Robinson Bertram)
For Respondent : M Thomo (Sibusiso Shongwe and Associates

Summary: Labour law - unfair dismissal – Dismissal must be fair both procedurally and substantively – The trial court found the appellant was properly found guilty of misconduct but was subjected to unfair procedure therefore dismissal was unfair.

Disciplinary Code: The employer's disciplinary code provides for a final warning for the offence of theft in respect of a first offence with mitigation - the court aquo misinterpreted provision of the code in relation to the sanction for the misconduct of theft – the court aquo failed to inquire whether mitigating or aggravating factors have been proved for the purpose of sanction in terms of the disciplinary code.

Reinstatement: The court aquo gave no reasons for refusal of reinstatement - rules governing reinstatement versus compensation discussed – whether the employer/employee relationship had been rendered intolerable by the employee's misconduct is a matter of fact and depends on the nature of the misconduct.

Held: The employer's disciplinary code supersedes the common law principle which ordinarily supports summary dismissal.

Held: Factors constituting mitigation of the offence have been shown to exist and therefore a lesser sanction of a final warning, not dismissal should have been imposed.

Held: in the absence of reinstatement the appellant is entitled to maximum compensation and other terminal benefits.

JUDGMENT

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[1] The Appellant was employed by the Respondent as a waste water attendant since August 2002. His position required him to work weekend shifts. He was dismissed from employment on the 9th July 2013 following a disciplinary process for a charge of theft. The Appellant appealed the dismissal decision of the chairperson to the Managing Director, with a result that his dismissal was confirmed.

[2] The Appellant launched a claim for unfair dismissal before the Industrial Court (IC) following a certificate of unresolved dispute issued by the Conciliation Mediation and Arbitration Commission. The Industrial Court issued a decision in favour of the Appellant to the effect that his dismissal was procedurally unfair. However, the Appellant is dissatisfied with the finding of that court that the respondent observed substantive fairness in arriving at the verdict that the Appellant was guilty of theft of the employer's 2.5litre of fuel. The Appellant is also dissatisfied with the *court a quo's* award of E26, 154 compensation against his claim which included reinstatement, failing which compensation in the amount of E86, 311.37.[1] The *court a quo's* order only states that it is a six months compensation with no further details on the figure.

[3] The grounds of appeal before this Court against the judgment of the *court aquo* briefly stated are as follows:

[1]The Appellant's claim comprised notice pay, additional notice pay, leave pay, severance pay and 12 months maximum compensation for unfair dismissal.

1. *The court aquo erred in law in finding the Appellant guilty of theft of fuel as Appellant took the fuel with a clear intention to replace it.*
2. *Error in law in finding the Appellant guilty of theft without stating the reasons.*
3. *Error in law in finding that the Respondent's rules / regulations state that the use of its property amounts to theft – no such rules were produced in Court. Appellant's manager allowed him to borrow things from the Respondent.*
4. *Error in holding that disciplinary code provides that theft with mitigating factors warrants summary dismissal for 1st offence. The code infact provides that theft with mitigating factors for first offence warrants a final warning.*
5. *Error in law in dismissing the prayer for reinstatement.*
6. *Error in law in awarding costs against Appellant yet he was successful.*

Background facts

[4] It is common cause that on the 16 December 2012 the Appellant was on duty at the Respondent's depot situated outside Siteki. The Appellant took the employer's diesel amounting to 2.5 litres and used it to re-fuel his private car within the employer's premises. The VIP security guard on duty inquired or questioned the Appellant's action. It is in dispute as to the actual response of the Appellant to the query. There are conflicting versions between the Appellant's and the employer's. It is common cause that the Appellant did not seek or obtain authorization to utilize the employer's fuel for his private use. The VIP security guard reported theft of petrol to her supervisor at the time of the incident.

[5] Three days later on the 19 December 2012 the Appellant informed his supervisor about the incident and of his intention to replace the fuel. Again differing versions are presented of the circumstances in which the Appellant made the report. The Appellant's version is that he informed the supervisor of his intention while the employer's version suggests that he was questioned about the matter before volunteering the information. However the Appellant is on record explaining that he delayed to report the incident due to work pressure.

[6] According to the Appellant's version it took him another two days to replace the fuel which he did on the 20th December 2012. Three months later in March 2013 the Appellant was brought to a disciplinary hearing on a charge of theft of the said employer's fuel. In August 2013 he was found guilty of misconduct of theft by the chairperson of the hearing who recommended a dismissal. The verdict and sanction were confirmed on appeal by the Managing Director of the Respondent.

[7] The Appellant subsequently lodged a complaint of unfair dismissal at Conciliation Mediation and Arbitration Commission. The matter was eventually heard by the court *aquo* which decided that the employer's disciplinary chairperson properly found the Appellant guilty of theft, but that the internal appeal procedure followed by the Respondent was unfair. The court *aquo* found that the employer dismissed the Appellant's appeal without stating the reasons and that this amounted to procedural unfairness.

The court *aquo* also found that the employer's failure to give due regard to the information that the Appellant was a trade union shop steward gave rise to procedural unfairness.

[8] The first, second and third grounds of appeal are predicated on the court *aquo's* finding of fact that the misconduct of theft has been proved. The question whether or not theft was proved is one of fact based on the evidence led before the court *aquo*. The appeal before this court ought to be on questions of law in terms of Section 19 of the Industrial Relations Act/2000 (IRA). The Appellant assails the court *aquo* for making a finding without furnishing reasons. The Court states in its judgment that *"Taking into account the evidence that has been adduced before Court the Employer has proven that the Applicant committed the offence of theft."*[2] Indeed the Court aquo has not stated directly which evidence persuaded it to make its finding, that is which party's evidence was disbelieved by it and the reasons thereof. However, even if the court *aquo* furnished these details, (in keeping with expectation) this Court would be precluded on appeal to substitute its assessment of the oral evidence of the witnesses because unlike the trial Court this Court did not have the opportunity to observe the witnesses to be able to judge their credibility. Credibility of witnesses is assessed mainly by observing demeanour of witnesses and how they responded and reacted in the witness box, and the court *aquo* is best placed for that. This would be one of the reasons Section 19(1) of the IRA prescribes that the right of appeal from the IC to this court shall be on a point of law. Counsel for the Appellant's lengthy argument that the intention of the Appellant was to return the fuel and that he did replace it and

[2] See Paragraph [25] of the Court *aquo's* judgment.

therefore that his conduct did not constitute theft, cannot persuade this court to overturn the factual findings of the Court aquo on this point. The evidence of the Appellant and other witnesses regarding the Appellant's conduct was assessed by the *court a quo* which, without directly stating so, preferred the version of the Respondent's witnesses over his.

[9] The *court a quo* also made reference to the terms of the Respondent's disciplinary code[3] which counsel for the Appellant claims was not part of the documents in the proceedings before it. Counsel for the Respondent countered this claim and asserted that a copy the employer's disciplinary code was duly served on the respondent's counsel and was part of the proceedings in the *court a quo.* This Court was referred to an annexure to the Respondent's Heads of argument, titled *offences*.[4] Although this court did not see the rest of the document it has no reason to doubt the assertion that the *court a quo* referred to a disciplinary code that was properly a part of the proceedings before it.

[10] This Court finds no justification to disturb the finding of the *court a quo* that the employer satisfactorily proved before it commission of misconduct of theft. The finding relates to substantive aspect of the dismissal of the Appellant, that it was fair.

[3] According to the Court aquo the code forms part of a Recognition Agreement between the Respondent and the Appellant's trade union. See paragraph [19] of the judgement of the Court *aquo*.

[4] An extract from the employer's disciplinary code.

[11] The fourth ground of appeal is based on the *court a quo's* misreading or misinterpretation of the Respondent's disciplinary code in relation to appropriate award or sanction for theft of employer's property and related offences. The extract of the code[5] to which this Court was referred to prescribes in respect of the first offence with mitigating factors, a final warning on one hand, and summary dismissal for a similar offence with aggravating circumstances. However, the court *aquo* states that the recognition agreement entered into by the Respondent and the Appellant's trade union provides that *"theft/fraud, attempted theft, or fraud or unauthorized possession of corporation property with mitigating factors, a first offence warrants summary dismissal."*[6] [Emphasis supplied]

This assertion by the Court aquo is clearly contrary to the wording of the code as indicated above.

[12] The *court a quo* correctly stated that disciplinary code and procedure of an enterprise is essential and therefore, disciplinary action against an employee must be in line with it. The learned judge *a quo* correctly states further that both the employer and the employee are bound by the code. In line with these observations the *court a quo* should have proceeded to inquire if the Respondent had adhered to the provisions of its code in the sanction meted out to the Appellant. That is, whether there were mitigating or aggravating factors attendant to the misconduct or the Appellant personally. It did not do so because it misquoted the relevant provision of the code and therefore appeared to have favoured the hard-line

[5] Annexure to Respondent's Heads of argument before this court.

[6] At paragraph [19] of the judgment.

common law position as enunciated by Grogan's *Work Place Law* and other authorities quoted in its judgment.[7]

[13] Counsel for the Respondent submitted before this Court that there were aggravating factors which warranted summary dismissal of the Appellant. Counsel supported his submission by reference to *Grogan, Work place Law* on the common law principle that theft from the employer attracts summary dismissal regardless of any mitigating circumstances such as the value of the property, first offence or whether the stolen property was restored. This argument is not sustainable in the face of the disciplinary code which is binding on both parties.

[14] The Appellant's appeal on this ground has merit to the extent that the Respondent's disciplinary code effectively alters the common law position regarding a sanction for theft from the employer. This in my view made it imperative that the *Court a quo* ascertained that the employer's sanction properly took the relevant provision of the code into account; that the disciplinary chairperson considered and stated in the award of punishment whether mitigation or aggravation existed, and that the relevant provisions of the code were applied accordingly.

Counsel for the Appellant submitted before us that mitigation factors existed and highlighted them as follows:

1. Value of stolen fuel was minimal at E50.00 or less.
2. The fuel was replaced.
3. Appellant was a first offender

[7] The Court aquo cited among others, *Sinclair v Neighbour* 1967 2 QB 279.

4. Appellant served the company for 11 years at the time of dismissal.

Indeed, these are factors relevant to the nature and circumstances of the offence committed, and are ascertained from the facts of the case that were before the *Court a quo*.

[15] Counsel for the Respondent on the other had submitted that the stolen 2.5 litre fuel was not restored and that there were aggravating circumstances. The submission that the fuel was not replaced runs contrary to the evidence seemingly accepted by the trial court. Respondent's Counsel failed to cite the aggravation save to refer to the common law as narrated by Grogan.[8] As already stated in this judgment the common law principle has in the present case been modified by the Respondent's disciplinary code. Therefore, the common law cannot be cited in this manner as an example of aggravation in the sanction aspect of this matter.

[14] The ground of appeal against the court *aquo's* dismissal of Appellant's prayer for re-instatement: It is not apparent from the face of the judgement why Appellant's prayer was dismissed. Ordinarily reinstatement is not considered appropriate where due to the misconduct there is evidence of fracture in the relations between the employer and the employee. In *casu* it has been argued for the Appellant that there was no such deterioration in the relationship following discovery of the misconduct because the Appellant was allowed to continue with his duties for a period of several months before

[8] Supra.

his dismissal. Counsel for Appellant submitted that the misconduct did not result in the employer/employee relationship being intolerable hence he was not suspended from work. Again, this is an area where this Court does not have the benefit of the reasons behind the decision of the *Court a quo* which heard and observed the witnesses for both sides.

[16] The Respondent challenges in its cross appeal the *court a quo's* finding that the Respondent furnished no reasons in its dismissal of the Appellant's internal appeal against his dismissal. Counsel referred to the letter of the Managing Director of the Respondent advising the Appellant of dismissal of his appeal. He submitted that the letter stated sufficient reasons for the dismissal of the appeal. The MD stated that he concurred with the findings and recommendation of the disciplinary chairperson. It was not necessary for him to repeat what the chairperson had stated because in essence the appeals chairperson was saying that his letter should be read together with the reasons stated by the disciplinary hearing chairperson. The letter reads:

> *"This letter serves to respond to your appeal request of the 31st July 2013 and the subsequent appeal hearing of the 6th August 2013.*
>
> *I read your letter of Appeal with the intention of establishing whether or not there was conformity to procedural fairness and natural justice to the matter starting from the charges. In addition I listened to your submissions and that of your representative during the appeal hearing.*
>
> *In summary I have found that none of the grounds presented justify a review of the verdict and sanction of the disciplinary hearing chairman. I therefore confirm that the verdict of the disciplinary chairman is upheld."*

[17] I am persuaded by the arguments of the Respondent's counsel that the letter communicates the essence of the reasons of the appeals chairperson's decision not to disturb the decision of the disciplinary chairperson. The appeal Chairperson does state that he finds no need to vary the decision of the hearing chairperson because he is satisfied that fair procedure and natural justice were followed by the hearing that resulted with his dismissal.

[18] Counsel for the Respondent denied that the fuel was restored and submitted that aggravating circumstances existed. However, Counsel failed to show any aggravation save to refer to the common law as narrated by Grogan.[9] As already stated in this judgment the common law principle has been modified in the present case by the Respondent's disciplinary code.

[19] For the dismissal to be fair the cardinal rule of our labour law is that the employer must show that it was carried out in a fair manner both procedurally and substantively. In the present case, only the latter was satisfied hence the dismissal was ruled unfair.

[20] From the foregoing analysis and findings the decision of the *court a quo* that the appellant was guilty of theft of employer's property is confirmed. The *court a quo's* finding that the dismissal fell short of procedural fairness is also confirmed albeit based on different reasons, as stated in this judgment.

The following order is made:

[9] Supra.

1. The *court a quo's* order dismissing the prayer for re-instatement is confirmed.
2. The *court a quo's* order for six months compensation in the amount of E26, 145.00 is set aside and replaced with the following order:

   2.1 That the Appellant be paid compensation for unfair dismissal calculated and based on the following:

   i. 12 months maximum compensation.
   ii. Notice pay.
   iii. Additional notice pay.
   iv. Severance pay.
   v. Undisputed leave pay due.
3. There is no order as to costs.

D Tshabalala AJA

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I agree M Dlamini AJA

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I agree M Langwenya AJA

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