



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 5/2006

In the matter between:

NELSON NKAMBULE

Applicant

And

PALFRIDGE (PTY) LIMITED

Respondent

Neutral citation: *Nelson Nkambule v Swaziland Palfridge (Pty) Limited (5 [2006] SZIC 12 (April 10 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : 26 March 2013

Judgment delivered: 10 April 2013

Summary:

The Applicant was dismissed for violation of company procedures regarding clocking procedures. Evidence revealed that the Applicant violated company procedures by failing to clock out. During the disciplinary hearing the Applicant was however not afforded the opportunity to mitigate before the passing of the sanction of dismissal.

Held: The dismissal of the Applicant was therefore procedurally unfair because he was not given the opportunity to mitigate before the sanction of dismissal was meted by the Chairman. The Applicant's right to a fair disciplinary hearing was therefore violated.

**JUDGMENT
10.04.13**

- [1] This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent.
- [2] The Applicant is an adult Swazi male of Fairview area in Manzini.
- [3] The Respondent is a refrigerator manufacturing company duly incorporated in terms of the company laws of Swaziland and has its principal place of business in Matsapha Industrial Site.

[4] In his application the Applicant averred that he was unlawfully and unprocedurally dismissed by the Respondent on 13th September 2005. These allegations are denied by the Respondent which stated in its Reply that the dismissal of the Applicant was procedurally and substantively fair. The dispute was reported to the Conciliation, Mediation and Arbitration Commission (“CMAC”), but could not be resolved and a certificate of unresolved dispute was issued by the CMAC Commissioner. The certificate of unresolved dispute is attached to the Applicant’s application and is marked Annexure “NN1”.

[5] The Applicant testified before the court and also led one witness in support of his case against the Respondent. The Respondent led two witnesses, being Leon Van Wyk and Isabelle Van Hoegaerden in its defence.

[6] The Applicant’s evidence revealed that he was employed by the Respondent Company as a Welder in October 2001. He remained in continuous employment until his dismissal on 13th September 2005. During the tenure of his employment, he was elected to the position of Chairman of the Workers Committee at the Respondent’s place. He said he was not in good terms with Leon Van Wyk. He said because of this, Leon Van Wyk used to issue numerous and unwarranted warnings against him. The Applicant said the reason for this was that he caused Leon’s friend, Julius

Dlamini, to be dismissed from the Respondent's employment. The Applicant told the court that he was tasked by the Chief Executive Officer of the Respondent, in his capacity as the Chairman of the Workers Committee, to investigate allegations of bribery at the workplace among the supervisors. The Applicant's investigations revealed Julius Dlamini as being involved in the practice of taking money from job seekers at the gate of the company. Julius Dlamini was then dismissed and Leon Van Wyk started to make life difficult for him for being responsible for the dismissal of Julius Dlamini who was his friend.

- [7] The Applicant also told the court that Leon Van Wyk hated him so much so that he issued warnings against him even for going to the bathroom.
- [8] The Applicant admitted that he did on some occasions leave early without clocking out. He told the court however that he got the permission to leave early and not to clock out from his supervisor Mr. Jeremiah Mangwe. He also told the court that sometimes he did not clock out because the clock cards were with the Production Manager. He also admitted that he did not report for duty on the following day that he had left early and did not clock out. He told the court that he was having a problem in that his wife, who

was also an employee of the Respondent, was sick and admitted at the Nazarene Hospital in Manzini.

[9] The Applicant told the court that at the hearing, the panel refused to call his witness, the supervisor. He said he was never advised of his right to appeal. He also told the court that Leon Van Wyk told him that it would be useless for him to appeal. He did appeal however and the appeal was dismissed.

[10] The Applicant's witness, AW2 Thoko Dlamini told the court that she is a former employee of the Respondent. She said she used to work in the same department with the Applicant. She worked for the Respondent from 2002 up to 2007. She said their supervisor was Jeremiah Mangwe. She said in the case of an emergency an employee would report to the supervisor and be released and the clock card would be endorsed in writing by the supervisor. She said on 06th May 2005 she did meet the Applicant in the supervisor's office where they had both come to ask for permission to leave early. She said the supervisor said he would sign their clock cards.

[11] On behalf of the Respondent, RW1, Leon Van Wyk told the court that he is no longer employed by the Respondent. He said he used to be employed by the Respondent as a Production Manager. He told the court that he was present during the disciplinary hearing of the Applicant and he was the

initiator. He said he verbally reprimanded the Applicant on several times for leaving the workplace without permission. He said the Applicant was counseled and thereafter suspended. He denied that the Applicant had the permission to leave early and not clock out as per the procedure at the workplace. He said if the Applicant had the permission, he could have called Jeremiah Mangwe to testify during the disciplinary hearing. RW1 confirmed the minutes of the disciplinary hearing. He denied that he resented the Applicant for causing Julius Dlamini to be dismissed. He said he reprimanded the Applicant because of his conduct of frequenting the bathroom which was affecting production. He said the Applicant was advised of his right to appeal.

[12] RW2, Isabelle Van Hoegaerden told the court that she worked for the Respondent from 2001 to 2007. She said she resigned after she got a better offer. She was employed by the Respondent as a Loss Control Manager. She was part of the disciplinary hearing. She was the recorder. She confirmed the minutes as a true record of the proceedings. She said if the Applicant wanted to call any witness, the panel would have allowed that witness to be brought to the hearing. She denied that the panel refused to call the Applicant's witness. She said she wrote the minutes by long hand, typed them later and forwarded them to the Human Resources office for distribution. She said the Applicant did fill the Appeal Form and was

advised to appeal to the Chief Executive Officer, Mr. Peter McCullough within three days. She said the Applicant did appeal. She said she was present during the appeal hearing. She handed to court Exhibit “R7” as the minutes of the appeal hearing.

[13] **Analysis of the Evidence**

The evidence revealed that the Applicant first appeared before the disciplinary hearing panel on 08th September 2005. On this day the record, Exhibit R1, shows that the Human Resources office was not represented. This was in violation of the Respondent’s own procedure manual which provides that persons attending the inquiry shall include, among others, the Human Resources Manager. The Applicant on this day had brought a lawyer to represent him. The lawyer was turned back by the panel on the basis that this was an internal inquiry and the Respondent’s procedures stipulated that at this stage the accused employee could only be represented by a fellow employee. The hearing was accordingly postponed until the following day 09th September 2005 at 11:30 a.m.

[14] The Applicant pointed out to the panel that there was no one suitable to represent him at the workplace. The Applicant was the Chairman of the Workers’ Committee. He also voiced his concern that the charges were

serious. This session ended at 12.15 p.m. according to Exhibit R1. The Applicant was therefore given less than twenty four hours to engage and brief another representative. This was clearly unfair on the part of the Applicant.

[15] On the next hearing date on 09th September 2005 the record, Exhibit “R2” shows that there was no one representing the Human Resources office. The Applicant was asked by the Chairman, Peter Dubber if he was able to find a representative. The Applicant answered that he was unable to do that as there was no one at the Respondent’s place capable of representing him. On this day the Applicant asked that the inquiry be dismissed as there was no date and time specified on the charge. Leon Van Wyk suggested that there be a re – issue of the disciplinary inquiry notice. The panel agreed to this and the hearing was postponed until Tuesday 13th September 2005.

[16] On 13th September 2005 the proceedings resumed at 11:30 a.m. The Applicant was not represented. The record of the proceedings, Exhibit R3, shows that the Applicant was asked by the chairman if he wanted a representative. The Applicant said he did not. On this day a certain Roy Singh was representing the Human Resources office. According to Exhibit R3 the charge that the Applicant was facing was;

“Unauthorised absence from his work place in that you arrived late on Monday the 5th September 2005 and left early on the dame (sic) day without following procedure regarding his clock card.”

By “dame day” the court will safely assume that the recorder meant same day. The Applicant’s answer to the charge as appears from the record was:-

- On Monday he reported that he was going to be late.
- He did not clock out because his card was not with him.
- He spoke to someone else because his team leader was not present.
- He went home early because he had problems, the same ones that made him to be late in the morning.

[17] The Applicant was found guilty for not following clock card procedures on 05th September 2005. He was sentenced to a dismissal. Before the sentence was meted by the Chairman, the Applicant was never given the opportunity to mitigate. This was yet another procedural defect in the hearing process.

[18] The Applicant filed an appeal. The appeal was dismissed by the Respondent’s Chief Executive Officer, Per McCullough.

[19] The Applicant told the court that he did not clock out because he got permission from his supervisor Jeremiah Mangwe. The court was told that Jeremiah Mangwe is now late. This explanation by the Applicant was clearly an after thought. If it was true he would have told the panel that he got permission to leave early and not to clock out from Jeremiah Mangwe. During the disciplinary hearing, when he was asked to whom did he report to that he was going to be late for work, he said he reported to Calimesa. When asked why he left work early without clocking out, he said Eric Mthethwa was not there.

[20] The court is satisfied from the evidence before it that the Jeremiah Mangwe story is an afterthought and that his name was brought up because he is late and cannot now appear before the court to refute the statement.

[21] Before the court the Applicant spent a lot of time trying to paint the picture that the initiator, Leon Van Wyk hated him and that his dismissal was nothing but victimization following the dismissal of Leon Van Wyk's friend, Julius Dlamini. This however was not part of the grounds for the dismissal stated in his application before the court.

[22] In his papers the Applicant stated that when he appealed to the Chief Executive Officer, he advised him that it was useless to appeal as the

decision of the disciplinary hearing would be confirmed. In court however the Applicant said it was Leon Van Wyk who told him that the appeal would be useless. This conduct by the Applicant exposed him as being not a credit worthy witness. Furthermore, in court the Applicant created the impression that he was merely being victimized by Leon Van Wyk for causing the dismissal of his friend Julius Dlamini. That was not however the Applicant's case on the papers before the court.

[23] The Respondent did not produce the record of the appeal hearing. The Respondent only handed to court Exhibit "R7" being a copy of an electronic mail forwarded to Adelaide Zondi by Isabelle Van Hoegaerden telling her how the appeal proceedings went. In this document the following is recorded:-

"Present: Peter McCullough, Nelson Nkambule

Peter McCullough told Nelson Nkambule that he had read the minutes of the hearing and that he could not find fault with the way the hearing was conducted. He asked Nelson if he had anything to add, and Nelson replied that the reason he was often absent was because when he took his sick child or wife to the clinic, the clinic makes out a sick sheet in his name

because he brought the child to the clinic, therefore it is not fair that he should be dismissed for habitual absenteeism”

[24] It is clear from this record by Isabelle Van Hoegaerden that the Chairman of the Appeal hearing came to the hearing having already made up his mind about the outcome of the hearing. The proceedings were so seriously flawed that technically, there was no appeal hearing. This was a third procedural defect arising from the internal disciplinary hearing of the Applicant.

[25] **Burden of Proof:**

The Applicant is claiming that he was procedurally and substantively unfairly dismissed by the Respondent. The burden of proof was therefore on the Respondent to prove on a balance of probabilities that the dismissal of the Applicant was for a fair reason and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant.

[26] On the evidence presented by the Respondent before the court, the Respondent was able to prove that the Applicant committed a dismissible offence in terms of the Respondent’s Procedure Manual, Exhibit “R4”.

[27] The dismissal of the Applicant was however procedurally unfair for the following reasons:

“27.1 He was given less than twenty four hours to engage and brief a representative when the hearing was postponed on 08th September 2005 after his lawyer was rejected.

27.2 After he was found guilty by the Chairman, he was not afforded the opportunity to mitigate before the passing of the sanction of dismissal.

27.3 On appeal there was no evidence that he was informed of his right to have a representative. Further, it appears from the record that the appeal Chairman came to the hearing having already made a decision on the matter. Before the Applicant addressed him, he told the Applicant that he has read the minutes of the hearing and that there was no fault in the hearing.

[28] The court therefore comes to the conclusion that the dismissal of the Applicant was procedurally unfair.

[29] **Relief**

The Applicant told the court that he is presently not formerly employed. He also told the court that the mother of his two children whom he was attending at the Hospital eventually died in 2007. He had worked for the Respondent for four years. He was getting a salary of E544.50 per fortnight which means that he earned E2,178.00 per month. Taking into account all the personal circumstances of the Applicant and also all the circumstances of this case, the court will order that the Respondent pays compensation to the Applicant an equivalent of four months' salary. There was no prayer for costs, there will accordingly be no order as to costs.

[30] The court will accordingly make the following order:

- a) **The Applicant's dismissal was procedurally unfair.**
- b) **The Respondent is ordered to pay to the Applicant within fourteen days the sum of (E2,178.00 x 4) E8,712.00 as compensation for the unfair dismissal.**
- c) **There is no order for costs.**

[31] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. N. NKAMBULE
(NKAMBULE ATTORNEYS)**

**FOR RESPONDENT: MR. W. B. MAGAGULA
(MAGAGULA ATTORNEYS)**