



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 379/2005

In the matter between:-

BONGANI DLAMINI & 2 OTHERS

APPLICANTS

AND

SWAZILAND MEAT WHOLESALERS LTD

RESPONDENT

Neutral citation : *Bongani Dlamini & 2 Others v Swaziland Meat Wholesalers Ltd (379/2005) [2014] SZIC 40 (24 September 2014)*

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

DELIVERED : **24 SEPTEMBER 2014**

Summary: *Labour law – Unfair Dismissal: Applicants contend that their dismissal by the Respondent was both procedurally and substantively unfair. **Held:** No dismissal will ever be deemed fair if cannot be proved by the Employer that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness]. **Held:** Even in situations where the Employer is convinced of the guilt of the Employee, it is still obliged to ensure that a fair disciplinary process is observed. **Held:** Dismissal of the Applicants in casu was procedurally and substantively unfair.*

1. Bongani Dlamini, Sabelo Magagula and Nathi Mabuza are all former employees of the Respondent. They have come before this Court for a determination as to whether their dismissal by their former employer, Swaziland Meat Wholesalers Ltd, was procedurally and substantively fair or not.

2. At the initial date set for commencement of trial in this matter, the Respondent's Counsel, Mr. Motsa, raised a flimsy preliminary point to the effect that the Applicants had failed to exhaust all internal remedies in the workplace before rushing to this Court for determination of this dispute between the parties. He contended that they should have appealed the decision to dismiss them before referring the matter to this Court for determination. What, perhaps, he failed to realise was that the erstwhile attorneys of the Respondent had written to the previous attorneys of the Applicant to advise that '*...the only route open to [Applicants] is to report a dispute and have the matter dealt with in terms of the Industrial Relations Act.*' (See page 37 of the book of pleadings). The Court therefore ruled that it was no longer open to the Respondent to be now raising this point *in limine* as they did. As it were, this Court cannot allow a situation where the Respondent can blow hot and cold at the same time. It cannot be allowed to have its cake and still eat it. It is for this reason that the preliminary point was accordingly dismissed.

3. The evidence of the Applicants, through the first two of the disputants – Bongani Dlamini and Sabelo Magagula – was to a large extent similar. According to Bongani Dlamini, he was employed by the Respondent employer in February of 2008, as a truck driver earning a monthly salary of E950. He went on to state that one December 2001 afternoon, as the employees of the Respondent were about to knock off from work, they were informed by one of the Directors – Torgerman Shirman – who advised them that all the employees should proceed to eVeni, in Mbabane, for a meeting at his place of residence. Indeed the employees boarded a staff bus to be driven to the meeting but were surprised when the bus instead took them to the Mbabane Police station.
4. At the police station some of the employees were called in one at a time and interrogated. He stated that he was tortured by the criminal investigation officer who accused him of theft of meat at his work place. He was thereafter detained until his court appearance on 04 January 2002, where he and his 3 co-accused were admitted to bail and released from custody. After his release he reported for work the next day but was not allowed to resume his normal duties, being told instead that he should only come back once the criminal matter against him and his co-accused had been concluded in court. The criminal matter eventually went on trial and he was acquitted and discharged. On being acquitted he and his co-accused reported for work

to advise the employer of the outcome of the criminal matter and to resume their duties. But lo and behold, to their dismay they were turned back at the company's main gate upon being informed that they were no longer employees of the Respondent as they lost their jobs on the day they were granted bail by the court. This surprised them because they were never taken through the formal process of a disciplinary enquiry to determine their guilt or innocence on the issue.

5. Under cross examination by Attorney Mr. Motsa on behalf of the Respondent, this witness stated that the reason for his acquittal on the criminal matter was because there was no evidence linking him to the alleged theft. He pointed out that there was a full blown trial where witnesses were called and that in fact one of the accused employees was implicated hence he was found guilty and the rest of them acquitted. The Respondent's representative further stated that evidence was to be led in this Court to show that this witness had delivered meat stolen from the Respondent company's business to his own 'customers', but this witness vehemently denied this allegation. The Court points out though that no such evidence was eventually led as promised by Mr. Motsa on behalf of the Respondent. It was also put to this witness that he was once found in the hides department where he had hidden a crate of meat, again this witness disputed this allegation, pointing out that there was a Security Guard who

was always stationed at the premises of the Respondent. As such there was no way he could steal meat without the guard noticing.

6. The next witness was Sabelo Magagula. His evidence under oath was that he was employed by the Respondent as a Blockman in April 1997 at a monthly salary of E1,050. Like the first witness, he also stated that the employees whilst working one afternoon had been ordered by one of the Directors (Torgerman) to all board a bus for a meeting at his residence in Mbabane. However that was not to be as the bus drove them to the police station where they were called in one by one for interrogation. In the end four of them were detained and subsequently appeared in Court where they were admitted to bail. The matter eventually went on trial and they were acquitted and discharged.
7. After their acquittal they presented themselves to the employer to resume their duties since the employer had previously refused to allow them to do so saying their matter was still pending in Court. However the employer denied them entry into the company premises telling them that they had been dismissed when they were admitted to bail. This witness further pointed out that during and after their criminal case, the employer never at any stage charged or called them to appear before a disciplinary enquiry.

- He went on to state that the employer did not even call them to explain the allegations of theft against them.
8. Mr. Motsa in cross examining this witness pointed out that the Respondent was going to lead evidence to prove that this witness had been found in the cow hides department hiding a crate of boerwors, and this witness vehemently denied this allegation against him. Motsa further stated that evidence would also be led to show and prove that this witness and the other two Applicants had changed the padlock to the door to the cow hides department to unscrupulously access it. Again this witness denied the allegation. That was the Applicants' case.
 9. First to testify in support of the Respondent's case was Vivian Dlamini. He currently holds the position of Manager at the Respondent's undertaking. He pointed out that the Respondent company had been incurring stock shortages from the year 2000. All the employees were then called to a meeting where the Directors raised the issue and advised all the employees that those responsible for the shortages should as at that date desist from their thieving misconduct. At that meeting some of the employees suggested that Police be involved to apprehend the suspects but that never happened.

10. Days went by and the theft continued resulting in more stock shortages. At this point management had apparently had enough of the unrelenting shortages and decided to involve the police. The employees were duped into believing that there was going to be a meeting at one of the Directors' residence in eVeni, Mbabane, and they were instructed to board a bus to take them there. However, instead of the bus taking them there it drove all the employees to the police station where they were interrogated and four of the employees were subsequently detained and charged. This witness later learnt that they were acquitted and discharged by the Court. And under cross examination he pointed out that he did not know anything about the Applicants being called to a disciplinary hearing or them being questioned by one of the Directors, Drore Torgerman, about the shortages.
11. The second witness to testify in support of the Respondent's case was Joseph Barros. He testified under oath as follows: that he was currently unemployed but had previously worked for the Respondent between the years 1994 and 2006 as a handyman. His job description entailed electrical, maintenance and plumbing works at the undertaking. Like the rest of the previous witnesses, his evidence in relation to the alleged meeting at one of the Directors' residence was also that they were informed as such but it turned out that they were being taken to the police station. Interestingly though, his evidence had a slight variance on the mode of transport, him

- stating that they were transported in a truck instead of a bus as alleged by the previous witnesses before him.
12. At the police station they were individually questioned on the stock shortages and he was surprised at interrogation on the issue since as far as he was concerned this was all new to him. In other words, and as he put it, he was hearing of this allegation for the first time at the police station. The investigating officers even suggested that this witness was colluding with Sabelo Magagula on the meat theft but he strenuously denied any such involvement in such misconduct. He told the police officers of an incident in which he was approached by Nathi Mabuza who wanted keys to the cow hides room and he declined to get the keys for him. According to Barros he declined to get the keys for the said Nathi Mabuza because he did not understand what he wanted there in the first place.
 13. According to the further evidence of this witness his refusal with the keys was also because the cow hides room was at times used as an exit/transit point for stolen meat. And he (this witness) had personally seen Sabelo Magagula put a crate full of meat into that room. Surprisingly though, he did nothing about this and also did not inform anyone. His excuse being that he was scared of putting his life in danger. This witness also testified

- that the three Applicants before Court were close to each other, that is why he assumed that they carried out illegal activities together.
14. Under cross examination it emerged that this witness was not at Ngwenya with the rest of the other employees when they were driven to the Mbabane police station. Instead he was fetched from one of the Respondent's branches in Mbabane when the rest of the employees were already at the police station. He conceded that indeed he was not in Ngwenya with the rest of the staff members but had found the others at the police station and that they had travelled in a kombi to the police station.
 15. When the Applicants' representative probed the issue of this witness stating in his evidence in-chief that it was the first time he heard of the allegations of theft of meat at the police station, he paused for a while before ultimately changing to now say it was not the first time he had heard of the thieving allegations at the police station. However, and according to witness Barros, he did nothing about this, he saw no need to report to management despite concerns having been raised on stock shortages due to theft. That was the Respondent's case.
 16. The well known and trite principle of our law is that all cases of alleged unfair dismissal are assessed on the basis of two criteria – namely;

substantive and procedural fairness. The essence of the doctrine of unfair dismissal is principally for the protection of employees against arbitrary dismissals. This is one of the most basic and fundamental rights accorded to employees. In the matter of ***Jabulani Shoba v Swaziland Government IC Case No. 41/2009*** this Court stated thus; *‘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.’*

17. Now, before this Court, the Applicants allege their dismissals by the Respondent Employer were both procedurally and substantively unfair. And to overcome this hurdle, the onus was on the Respondent to bring forth evidence to show and prove that the dismissals were initiated following fair procedures (procedural fairness) and for fair reasons (substantive fairness).

18. It is common cause that the three Applicants before Court were arrested in December 2002, on a charge of theft. Apparently they were detained until their appearance in Court where they were granted bail upon application. They were thereafter released on different dates after posting bail. However when they attempted to resume their duties the Respondent employer informed them that they would only be allowed to return to their posts once the criminal matter against them had been concluded. The criminal matter eventually went on trial and they were acquitted and discharged on the charge they were facing and one Nhlanhla Mandela Mdluli was convicted after being linked to the commission of the offence. On their acquittal, they again presented themselves to the Employer to be allowed to resume their duties but this time the Employer advised them that they were dismissed after their release on bail.
19. In its closing submissions the Employer, through its legal representative, conceded that there was no formal hearing and that the Applicants were not charged. However in its reply to the claims of the Applicants the same Employer submitted that when the Applicants reported for work after the criminal Court case, they were brought to a disciplinary hearing before the Managing Director, which hearing resulted in their dismissal. This is clearly a contradiction which cannot just be overlooked by the Court. It is unfortunate that the Respondent decided not to call Director Dror

Torgerman to testify in support of its case. His evidence would have gone a long way in assisting the Court to appreciate what really informed the decision to dismiss the Applicants. In *Nkosinathi Ndzimandze & Another V Ubombo Sugar Limited IC No. 476/2005* Dunseith JP (as he then was) stated that “...even in situations where management is convinced of the guilt of employees, it is still obliged to ensure that a fair disciplinary process is observed.” In this matter, as it is, and based the evidence before this Court, the Employer has failed to prove that the dismissals of the Applicants were initiated following fair procedures.

20. The next enquiry then becomes whether the dismissals were for fair reasons. As articulated in the *Jabulani Shoba* matter (*supra*), the substantive fairness of any matter is to be determined on the basis of the reasons on which the Employer relies for terminating the services of the employee. And in this matter, the Respondent through its Attorney, submitted that the Applicants were dismissed for a fair reason as permitted by Section 36(b) of the Employment Act and that therefore it was reasonable to terminate their services in the circumstances. In support of this contention the Respondent brought in Joseph Barros.
21. However, the well known principle of the law is that he who bears the onus can only ordinarily discharge it by adducing credible evidence to support its

- case. In this present matter before Court, the contention of the Applicants is that their dismissal was unfair – they deny being involved in the stock shortages. The Respondent on the other hand states that the dismissals were for a fair reason – being that the Applicants were responsible for the stock shortages through theft. The onus in this matter rests with the Respondent.
22. A question the Court asks itself is whether it can be said that the Respondent in casu has discharged the onus resting squarely on its door? In answering this question the Court has considered the credibility of the various factual witnesses, their reliability and the general probabilities of the matter. It is the considered view of the Court that the Applicants have satisfied the Court on a preponderance of probabilities that their version more probable than that of the Respondent. The Court accepts the version of the Applicants and accordingly rejects that of the Respondent.
23. The case of the Respondent is riddled with so many contradictions, inconsistencies and improbabilities such that it is safe not to rely on it. For instance, Attorney Motsa in cross examining the very first witness (Bongani Dlamini) put it to him that evidence was to be led during the Respondent's case that he (Bongani Dlamini) had been found in the cow hides department where he had hidden a crate of meat. Further he had put it to this witness that the Respondent would lead evidence to prove that he delivered meat

stolen from the Company to his own customers, which Dlamini denied. However when the Respondent presented its evidence on these issues, witness Joseph Barros's evidence was that he had once seen Sabelo Magagula, and not Bongani Dlamini, put a crate of meat in the cow hides room. This was clearly a contradiction to what had been earlier put to Bongani Dlamini. Interestingly as well, this very same witness also stated that he did nothing about this. Even more confusing is the fact that in his evidence in chief he informed the Court that at the police station, it was the very first time he learnt of the theft of meat at his place of employment. He was later to do an about turn to say that in fact it was not the first time he heard of same. Over and above all this, no evidence was adduced to show and prove that the Applicants delivered any stolen meat to their customers, as insinuated that Attorney Motsa.

24. The employer in casu has failed to prove that the probabilities of the employees being guilty are greater than the probabilities of them not being guilty. It has failed to adduce credible and probable evidence in support of its case. Where such is the situation, the inescapable conclusion is that the dismissal will be deemed substantively unfair. It is the finding of this Court therefore that the dismissal of the Applicants was also substantively unfair.

25. The 1st Applicant in the matter informed the Court that since his dismissal he had been unable to secure permanent employment, only succeeding in getting temporal and piece jobs through which he survives. He is married with 5 children and also takes care of his late brother's children together with his parents. He painted a picture of surviving from hand to mouth. He had been employed in February 1998 as a heavy duty Driver with a monthly salary of E950.00. Sabelo Magagula also informed the Court that he was not employed as he had also failed in his bid to secure alternative employment. He is also married with 3 children and has other dependents besides his own. Magagula had been employed in April 1997 as a Blockman and remunerated at the monthly rate of E1,050.00. Nathi Mabuza's personal circumstances are also that he is also currently unemployed, is married with 3 children and has other dependants as well. He had been employed as a general Labourer and was paid at E850.00 per month.
26. There is a dispute on the date of their dismissal. The Applicants state that they were dismissed in January 2004. This was after their acquittal on the criminal charges when they presented themselves at their work place. The Respondent on the other hand states that they were dismissed after their release on posting bail. The evidence before this Court however, is that the Applicants were released on bail in different dates. Bongani Dlamini for

instance was released immediately after his first appearance, whilst the other 2 Applicants were released after 3 and 6 months respectively. Further to this, the evidence also indicates that when they initially presented themselves to resume their duties, they were advised to await the outcome of the criminal case. In view of the foregoing the Court accordingly makes a finding that they were dismissed after their acquittal in January 2004.

27. Taking into account all the circumstances of the case, the Court finds that it was unreasonable and unfair for the Respondent to terminate the services of the Applicants. The claims of the Applicants therefore succeed. The Court accordingly makes the following order;

- a) The dismissal of the Applicants by the Respondent was both procedurally and substantively unfair.
- b) The Respondent is hereby ordered and directed to forthwith pay the Applicants as follows;

BONGANI DLAMINI

Notice Pay -	E 950.00
Additional Notice pay -	E 584.64
Severance Pay -	E 1,461.60
Leave outstanding (36 days) -	E 1,315.44
School contributions refund -	E 1,200.00
December 2002 salary -	E 950.00
12 months compensation -	E11,400.00
For unfair dismissal.	

Total **E17'861.68.**

SABELO MAGAGULA

Notice Pay -	E 1,050.00
Additional Notice Pay -	E 807.80
Severance Pay -	E 2,019.50
Leave outstanding (36 days) -	E 1,454.04
School contributions refund -	E 1,200.00
December 2002 salary -	E 1,050.00
12 months compensation -	E12,600.00
For unfair dismissal	

Total **E20'181.34**

NATHI MABUZA

Notice Pay -	E 850.00
Additional Notice Pay -	E 261.60
Severance Pay -	E 654.00
Leave outstanding -	E 1,177.20
School contributions refund -	E 1,200.00
December 2002 salary -	E 850.00
12 months compensation –	E10,200.00
For unfair dismissal	

Total **E15'192.80**

The Respondent is also directed to pay the Applicants costs of suit.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 24th DAY OF SEPTEMBER 2014

For the Applicants : *Mr. Musa R. Ndlangamandla*
For the Respondent : *Attorney Motsa (LR Mamba & Associates).*