



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 14/2014

In the matter between:

CLEMENT DLAMINI

Applicant

And

O.K BAZZARS (PTY) LTD

T/A O.K FURNITURES

Respondent

Neutral citation: Clement Dlamini v O.K. Bazaars (PTY) LTD t/a O.K. Furnitures
[2018] SZIC 74 (16 July 2018)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members
of the Court)

Date Heard: 25/07//2018

Date Delivered: 16/08/ 2018

SUMMARY: *The Applicant was dismissed for unauthorised possession of Respondent's property; Respondent failing to lead evidence of policy regarding disposal of returned goods; failing to lead evidence of restriction on right to representation by union official:*

Held: *Dismissal substantively and procedurally unfair.*

JUDGMENT

[1] This is an application for the determination of an unresolved dispute brought by the Applicant against the Respondent. The Applicant reported a dispute at the Conciliation Mediation and Arbitration Commission (CMAC). The dispute was not resolved and CMAC issued a certificate of unresolved dispute in terms of **Section 85 (1) of the Industrial Relations Act 2000** as amended.

[2] The Applicant alleges that he was employed by the Respondent on the 12th December 1999 as a Financing Clerk and stayed in the Respondent's employ until 5th February 2013 when he was dismissed following a disciplinary enquiry.

[3] In his papers the Applicant claims that his dismissal was both substantively and procedurally unfair in that he did not commit the misconduct he was dismissed for and also in that the Respondent opened a criminal case against him and then at the same time charged him with misconduct and subsequently dismissed by the Respondent. In his evidence before Court he then alleged that the dismissal was

procedurally unfair because he had been denied representation at the disciplinary hearing.

[4] In its reply, the Respondent admitted dismissing the Applicant and averred that Applicant's contract of employment was terminated for a reason contemplated in **Section 36** read with **Section 42 of the Employment Act 5/1980** as amended; that the Applicant violated procedure for an insurance claim by a customer of the Respondent and misappropriated a HI-FI set belonging to the Respondent and then brazenly attempted to conceal the said misappropriation.

[5] The Applicant gave evidence in proof of his claim. He stated that his job entailed, in part, that he processes insurance claims filed by the Respondent's customers. He said that on a particular day towards the end of 2012, a customer by the name of Nhlabatsi came into the shop at which he worked, in Manzini to file an insurance claim in respect of a Sony HI-FI set which the customer claimed had been damaged by rain. It was Applicant's evidence that, as was the norm, he went to verify the customer's claim and found that the HI-FI set had indeed been damaged by the rain. The Applicant then started the process of filing the insurance claim for the loss of the HI-FI set on behalf of the customer.

[6] It is common cause that the said customer's claim was successful and that in December 2012, just before Christmas, the customer's damaged HI-FI set was replaced, not with the exact model as the damaged one but with a slightly better model, because the exact model was no longer in stock. It was Applicant's evidence

that when the customer was told to collect the replacement HI-FI set, he did not bring to the shop the damaged HI-FI set.

[7] It was Applicant's evidence that he then asked the Stock Clerk if he could collect the damaged HI-FI set from the customer since the shop had not asked him to return it. Applicant said he sought the Stock Clerk's permission to keep the damaged HI-FI set for himself. His testimony was that the Stock Clerk, Lindiwe Zwane agreed to this and only asked that Applicant return two remote controls to the store so that she could assist another customer. The Applicant then arranged for the HI-FI set to be collected from Mr. Nhlabatsi and to be delivered at his homestead at Nhlambeni.

[8] The Applicant testified further that sometime in January 2013, while he was out of the office, Lindiwe Zwane called him and asked that he return the damaged Hi-Fi set that he had collected from Mr. Nhlabatsi because there was going to be a stock audit and the people from head office conducting the audit would need to see the returned damaged Hi-Fi set. His evidence is that he returned the Hi-Fi set to the Respondent's repo-room where the Respondent stored repossessed goods.

[9] He testified that before the end of that day, one Stanley Msweli, the branch manager called him and asked him about the whereabouts of the damaged Hi-Fi set. His discussions with the branch manager were not friendly he claimed, and ended up with Mr Msweli threatening to beat him up. Before the day ended Applicant received a visit from a police officer who asked him to record a statement on the issue of the damaged Hi-Fi set, at the police station. The Applicant eventually led

the officer to the damaged Hi-Fi set at the respondent's repo-room. Applicant was advised that a case would be registered at the Magistrate's Court and that he would at some point be subpoenaed to appear there. This was after he had appeared at the Magistrate's Court as directed by the said police officer and the matter had not been called.

[10] The Applicant was thereafter suspended from work and was taken through a disciplinary enquiry wherein he was charged with misconduct, unauthorised possession of company goods. Applicant took issue with the disciplinary enquiry for the fact that he was refused representation by his chosen representative from the recognised union (SCAWU) and was, instead directed to choose a representative from the shop stewards or fellow employees from O.K. Furnishers or O.K. branches. He testified that because he was refused representation by the union official at the beginning of the hearing, he was given insufficient time to find another representative. Because of the time constraints, he was unable to find a representative and had to face the disciplinary hearing on his own and without representation.

[11] At the end of the disciplinary hearing Applicant was dismissed. He appealed his dismissal but the appeal was unsuccessful as the chairman of the appeal decided to uphold the decision of the initial hearing.

[12] Applicant's further evidence was that on 17th January 2013 and before the disciplinary hearing, the Stock Clerk, Ms. Zwane advised him to acknowledge a debt in respect of the damaged Hi-Fi set that he had taken home so that he would not be dismissed from work. In keeping with this advice, Applicant signed an acknowledgement of debt of the sum of E7799.00. Stanley Msweli and Ingrid Charmley were witnesses to Applicant's signature of the acknowledgement of debt. He testified that despite the acknowledgement of debt, his disciplinary process continued and he was eventually dismissed on 5th February 2013. His dismissal was confirmed on appeal on 25th February 2013.

[13] In cross examination, Applicant stated that where a customer makes an insurance claim because of damage to the goods he bought and the claim is approved, the customer upon delivering the damaged goods then receives the replacement goods. With particular reference to this matter the Applicant stated that when Mr. Nhlabatsi's claim was approved and he made arrangements to collect the replacement, the damaged Hi-Fi set ought to have been delivered to the shop before he was given the replacement Hi-Fi set. This did not happen and the customer was allowed to take the replacement Hi-Fi set (which was delivered to him) without bringing in the damaged one back to the shop.

[14] Applicant stated that while it was the shop's procedure that a customer return the old damaged item first, before being given a replacement item (in the case of a successful insurance claim based on damage to the goods sold to the customer),

this procedure was not always followed. He stated that sometimes goods were never collected from a customer who had received new goods replaced through an insurance claim. He stated that when goods were collected, they would sometimes be sold to the staff and/or to the public. Sometimes the branch manager, Mr Msweli would sell the damaged or repossessed good to his friends. In the case of the matter before court, he testified that the customer, Mr. Nhlabatsi did not return the damaged hi-fi set to the shop when the replacement hi-fi set was delivered to him.

[15] Much was made about who handed the new Hi-Fi set to the customer and how the old Hi-Fi set returned to the shop. In our view nothing really turns on those events, apart from issues relating to the credibility of the Applicant. What was established is that, he took the old/damaged Hi-Fi set home and it was not returned to the shop until there was a stock audit and he was asked to return it to the shop. What was in issue was whether he had been authorised by Lindiwe Zwane to take the damaged Hi-Fi set home for his own use and whether such authority, if it had been given, legitimised his possession of the damaged hi-fi set.

[16] The Respondent's witness was cross-examined at length on the circumstances surrounding the replacement of the damaged Hi-Fi set and the issue of certain remote controls that she was said to have asked Applicant to return but she stood firm in her testimony that she did not authorise Applicant to take and keep the damaged Hi-Fi set; that she had no authority to give away the Respondent's goods as

the damaged Hi-Fi set belonged to the Respondent; that during her time as Stock Clerk she had no knowledge of the acknowledgement of debt document and had no cause to utilise it in her day to day work and that, therefore, she could not have advised Applicant to sign the document in a bid to have him avoid the disciplinary hearing.

[17] No other witness was led by the Respondent which closed its case after Ms. Zwane had finalised her testimony. A bundle of documents was filed by the Respondent, which, among other documents, contained the minutes of the disciplinary hearing held against the Applicant. No one was brought by the Respondent to introduce and hand in the minutes and the other documents in the bundle. The Applicant was cross-examined on the documents in the bundle including the minutes of the disciplinary hearing. In cross-examination he admitted to the accuracy of the minutes of the disciplinary hearing. However, in re-examination he pointed out that certain things that took place at the hearing were not recorded in the minutes. An example of this was that it did not appear in the minutes that his representative had been asked to leave the hearing and that he would have to find a representative from the employees of the respondent.

[18] The Applicant's complaint with regard to the procedural aspect of his dismissal was that the respondent refused to allow his chosen representative into the hearing. He complained that even though the union, of which he was a member, was recognised by the respondent and his chosen representative was an official of the

union, the respondent limited his right to representation to a shop steward or a fellow employee. He was given limited time to find a fellow employee to represent him and the initiator of the hearing suggested some shop stewards who could possibly represent him. He testified that he was unable to find anyone willing to represent him because all including the shop stewards feared victimisation. He complained that even when it became clear that he could not find a representative the Respondent proceeded with the hearing despite that he was unrepresented.

[19] Apart from the documents filed in the bundle, the Respondent led no evidence with regard to the disciplinary hearing and the events leading up to the hearing. It was content with cross-examining the Applicant on various aspects of the hearing. He was asked, in cross-examination, where he got the right to be represented by an outsider at an internal disciplinary hearing. He pointed out that there was a recognised union at the Respondent's undertaking and that the respondent accordingly deducted subscriptions from employees monthly. He stated that as a fully subscribed member of the union he believed he ought to have been allowed representation by the officials of the union even if they were not employees of the Respondent.

It was further suggested to him that his right to representation was limited to shop stewards or fellow employees and that he had been given sufficient time to find himself a representative. He agreed that he had not asked for the hearing to be postponed because of his failure to find a representative.

[22] It is common cause that the applicant was an employee to whom **Section 35 of The Employment Act 1980** applies. The onus then shifted to the respondent to prove that the applicant was lawfully dismissed and taking into account all the circumstances of the case, it was a reasonable to terminate his service as required by **Section 42(2) of the Industrial Relations Act 2000** (as amended).

[23] The Industrial Court does not sit as a court of appeal to decide whether or not a disciplinary hearing came to the right decision on the evidence placed before it. *“It is the duty of the Industrial Court to enquire on the evidence placed before it, as to whether the provisions of the Industrial Relations Act and the Employment Act have been complied with and make a fair award having regard to all the circumstances of the case,”*

ICA Case No. 110/1993 – Central Bank of Swaziland v Memory Matiwane.

[24] It is common cause that the Applicant took the damaged Hi-Fi set from a customer for his own use. What was an issue was whether the Applicant had been given the Hi-Fi set by the Respondent through the Stock Clerk, Lindiwe Zwane. The evidence led by the Applicant and the Respondent’s witness were mutually exclusive. Applicant’s evidence was that Ms. Zwane gave him the damaged Hi-Fi set to keep and Ms. Zwane’s evidence was that she did not and could not have. The Respondent’s submission was that on a balance of probability, the evidence of its witness trumped that of the Applicant because there were plenty of inconsistencies in the Applicant’s evidence. We were also asked to consider the

record of the disciplinary hearing wherein some of the evidence led in court was inconsistent with what was said at the disciplinary hearing.

[25] There were a number of inconsistencies in the Applicant's evidence, particularly in cross-examination. However in our view the inconsistencies in the Applicant's evidence were with regard to peripheral issues; who called the customer to collect the new Hi-Fi set; when did the Applicant ask for the Hi-Fi set from Lindiwe Zwane; whether the replacement Hi-Fi set was delivered to the customer's place on Applicant's instruction or otherwise: There was an issue with regard to when the Applicant asked for the damaged Hi-Fi set from Lindiwe Zwane, whether it was when the new Hi-Fi set was given to the customer or when it was delivered at the customer's place, or whether it was closer to the audit date in January 2013. We nevertheless consider that the Applicant's evidence was not shaken on the material issue of how he came to be in possession of the damaged Hi-Fi set. The Respondent failed to adduce evidence of Mr Msweli, the then Branch Manager who would have stated unequivocally what the store policy was regarding the returning of damaged goods by customers who had claimed insurance and whether it was being enforced. Ms. Zwane was unable to say what the policy was save to say the damaged Hi-Fi set was the property of the Respondent.

The evidence of Sifiso Dlamini was also necessary in our view, to place into proper perspective when the Applicant could have asked Ms. Zwane for the damaged Hi-Fi set.

[26] The Court was asked to consider the disciplinary hearing minutes since the Applicant had agreed, in cross examination that they were correctly recorded. In the matter of **Hillside Aluminium (Pty) Ltd v Mathuse & Others (2016) 37 ILJ 2082 IC** the Court occasion to consider how bundles of documents prepared by litigants, as documentary evidence they intended to rely on in support of their respective cases ought to be treated. Of the three scenarios discussed by the Court it appears to us that the bundle filed by the Respondent and which included the minutes of the disciplinary hearing falls under the first scenario. At paragraph 58 of the judgment the Court says the following: *“The first scenario is where there is no agreement on the authenticity or status of documents or where the authenticity is disputed. In such instances the party wishing to produce a document and wants to rely on the document as evidence, has to prove the authenticity of the document by leading evidence and if the authenticity is not proved or admitted, the document is inadmissible may not be used in cross-examination and cannot be considered as evidence.”*

The Court goes on to say at paragraph 61 that *“where the document is a transcript or record of other proceedings, the same principles apply. Where the parties agreed that the transcript is what it purports to be and a true reflection of what purports to be recorded, it means that the record is authentic and correctly reflects that the proceedings indeed took place. In this scenario contradictions in testimony could be canvassed during cross-examination. The presiding officer is entitled to consider the portions of the transcribed record that were introduced by*

witnesses, either on evidence in chief or in cross-examination, as evidence. The presiding officer can not merely accept the entire record as evidence, but can accept as evidence those portions introduced by witnesses.”

[27] *In casu*, there was no agreement between the parties that the record of the disciplinary hearing would be accepted as evidence before us. Although the Applicant confirmed in cross-examination, that the minutes of the disciplinary hearing were accurate, he then pointed out, in re-exam that there were certain things that took place at the hearing that were not captured in the minutes of the disciplinary hearing. For example, it was not captured in the minutes that the Applicant’s chosen representative had not been allowed into the hearing. Nor was it captured that the Applicant was given some time to find himself a representative from the Respondent’s shops.

It appears to us therefore that even the accuracy of the document was being put into question. It appears to us that the Respondent had the *onus* to prove the authenticity of the minutes of the disciplinary hearing by leading evidence. It did not do so. The minutes are therefore inadmissible and cannot be considered as evidence.

[27] The Respondent’s only witness, Lindiwe Zwane denied giving the Applicant the damaged Hi-Fi set. It was argued on behalf of the Respondent that even if she had agreed that Applicant takes the Hi-Fi set Applicant would have known that it was wrong to take it; that she had no authority to give him the Hi-Fi and that at the

very least his supervisor the branch Manager Mr Msweli, would have been the correct authority to give him the Hi-Fi set. Applicant, it was said, would have known that keeping the Hi-Fi set was wrong which was why he was willing to return it.

[28] It does appear to us that the Applicant was not entirely certain of his legitimate right to keep the Hi-Fi set. We say this because had he been sure thereof then he would have been within his rights to refuse to return it and he would not, in our view, have agreed to sign the acknowledgement of debt. From Applicant's evidence in chief and in cross-examination it seemed that procedures were not being followed at the Respondent's undertaking particularly with regard to goods being returned to the shop either through repossessions or through the insurance replacement process. However, all this is speculation by the Court. The Respondent failed to lead any evidence indicating whether there was a set policy for the dealing with returned goods. Ms. Zwane said she could not say if there was such a policy and whilst Applicant said there was such a policy, it was not always followed.

In the circumstances one cannot say that the Respondent has discharged the *onus* to show that the Applicant was dismissed for a reason contained in Section 36 of the Employment Act.

[29] With regard to the procedural aspect of the Applicant's dismissal, the allegation that he was refused representation by his chosen Union official was not disputed.

What was put to him was that his right to representation was limited to shop stewards or employees of the Respondent. It was not denied that the Union (SCAWU) was recognised. No evidence of any nature was led regarding the basis of the limitation of the right to representation. If the Respondent and the Union had some agreement on this, such was not filed nor did any member of Respondent's management allude to it. In the circumstances we can only find that Applicant was refused representation as he has complained and that therefore his dismissal could not have been procedurally fair.

[30] It is the findings of the Court that the Respondent has failed to discharge the burden of proving that the Applicant was dismissed fairly both procedurally and substantively.

[31] The Applicant has not asked for reinstatement although he has testified that he remained unemployed. He is married with 3 children he had worked for the Respondent for at least 13 years. Taking into account the circumstances surrounding the dismissal and the conduct of all parties, including the Applicant's employment record and length of service; the Applicant's personal circumstances, the Court considers that an award of seven (7) months' salary would be fair compensation to be awarded to the Applicant. Applicant is also entitled to be paid his notice pay, additional notice and severance allowance. No evidence was led with regard to the Leave pay this it falls away.

[32] Judgment is entered against the Respondent in favour of the Applicant for payment as follows:

| | |
|-----------------------|---------------------------|
| Notice Pay | E 4 264.00 |
| Additional Notice pay | E 7 872.00 |
| Severance Allowance | E 19 680.00 |
| Compensation | E <u>29 848.00</u> |
| Total | E <u>61 664.00</u> |

The members agree



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. R. M. Ndlangamandla

For Respondent: Mr. S. Dlamini