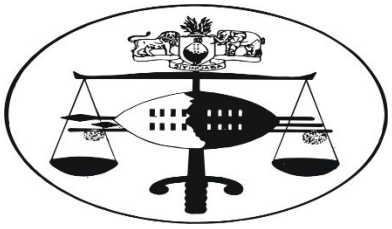

IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 14/2012

In the matter between:

LUCKY DLUDLU Applicant

And

SWAZILAND BEVERAGES (PTY) LTD Respondent

Neutral citation: Lucky Dludlu v Swaziland Beverages (Pty) Ltd [14/2012 [2020] SZIC 113 (11 September 2020)

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

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

Last called: 02 June 2020

Date Delivered: 11 September 2020

JUDGMENT

[1] The Applicant, Lucky Dludlu was employed by the Respondent on 15th December 2003 as an electrician and he was in the continuous employment of the Respondent until his services were terminated on the 19th August 2011.

[2] The Applicant alleges that the termination of his services was unfair both in procedure and substance and he has applied to court for a reinstatement order alternatively terminal benefits and maximum compensation for unfair dismissal.

[3] The Applicant's dismissal followed a disciplinary enquiry, the outcome of which was that he was found guilty of wilful disobedience of orders/instructions given to him by his supervisor. The Applicant appealed against the finding and sanction but the appeal chairperson upheld both the finding and the sanction. The minutes of the disciplinary hearing were filed in Court.

[4] Evidence led before Court is that on 28th July 2011 the Applicant was approached at his workstation by one Musa Mazibuko who asked him to repair a bath water thermo reactor that he had brought from the

laboratory. It was the Applicant's testimony that he looked at the machine, saw that it was unfamiliar to him and that it had some instrument component to it and then advised Mr Mazibuko that he did not know how to fix such a machine and would not take a chance.

[5] While Applicant and Mr Mazibuko were talking, his supervisor, Mr Msindazwe Dlamini, approached them and asked what the issue was. Applicant told his supervisor that he had been asked to fix the bath water thermo reactor but that he was unable to do so as he lacked the necessary qualifications to do so, and told Mr Dlamini that he did not have the qualification to repair the machine and that by its nature, it needed specialised people to fix it.

[6] Applicant testified that he was a grade2 electrician whose main duties while employed by the Respondent was to do industrial repairs of small and big machines with motors and to do domestic maintenance within the Respondent's premises. He stated that an instrument and control technician was required to repair the bath water thermo reactor. He held a lower qualification. It was his further evidence that equipment such as the water bath thermo reactor were fixed by the supplier.

[7] A few days later Applicant was approached by his supervisor who told him that he was under investigation and asked him, in writing to write a report about his failure to repair the machine on 28th July 2011. Applicant's report was filed as an exhibit. In it he states that he had explained to his supervisor that he did not have any knowledge of fixing such a machine, and that he had never acquired any training of repairing laboratory equipment and that the machine he was talking about was a specialised field of work. He stated that the reason for his refusal was that, **"I did not want to cause more damage in the machine since I did not have any technical know-how."**

[8] A few days later Applicant was taken to a disciplinary hearing where he faced a charge of:

"Wilful disobedience of orders/instructions given to you by your supervisor in that on the 28th July 2011, you refused to check and repair a bath water thermo reactor brought in by Musa Mazibuko from the laboratory, even after your supervisor personally instructed you to do so."

[9] At his disciplinary hearing the Applicant pointed out that he had told his supervisor that he did not want to tamper with the bath water

thermo reactor because it was out of his line of duty and also that the machine was an instrument and he did not fix instruments. He further pointed out that the machine was sensitive and his attending to it would have exposed the respondent to more costs, as he was not trained to fix it.

[10] The Respondent led three (3) witnesses in proof of its case, namely, Musa Mazibuko, Msindazwe Dlamini and Busisiwe Susan Dlamini. Musa Mazibuko testified that he brought the thermo-reactor to the maintenance department from the laboratory and that it was their norm to bring equipment to maintenance for repairs. He stated that they would normally leave the equipment and maintenance would either open and fix the equipment or return it to them timeously if they could not fix it with such advice so they could try other means.

He testified that he had previously brought thermo-reactors to the maintenance department for repairs and they had been repaired. He could not say what experienced and qualifications were held by those who had previously repaired the bath-water thermo reactors Vis a Vis those of the Applicants. He did not know the Applicant's qualification or those of the other departmental employees.

[11] The general position of our law is that wilful refusal to comply with the reasonable and lawful instruction of an employer or supervisor may justify dismissal. Such behaviour is generally known as insubordination. **Grogan, Workplace Law Juta 12th Edition, Chapter 12, paragraph 3.8 pages 125-126** advances the hypotheses that the inquiry into the gravity of the specific insubordination considers three aspects:

The action of the employer prior to the reasonableness of the instruction, and the presence of wilfulness by the employee. **Bhekithemba Mango v Murtorns Cane Contractors (Pty) Ltd (373/04) [2009] SZIC 50 (11 June 2009)**.

[12] Further, it has been said that insubordination warrants dismissal only if it is deliberate and serious that whether it is considered so depends on the circumstances including the manner in which it is expressed, the position of the person whose authority is repudiated and the reason for the employee's defiance.

(**See John Grogan, Dismissal, Discrimination and Unfair Labour Practices, Juta 2nd Edition Chapter 16 page 308**).

[13] The evidence before Court is that the Applicant refused to attend to the water bath thermo-reactor because he did not have the expertise to do so because it had an instrument component to it. He stated that the instrument component aspect required a much higher qualification than he had. The issue of the Applicant's qualifications to repair the machine is not in question. The Respondent's case and evidence as led by Mr Dlamini was that Applicant was expected to, at the very least do a root cause analysis that other electricians in the Applicant's department had carried out repairs on the instrument machines. It was submitted therefore that the instruction given to Applicant was not only reasonable but that Applicant's refusal to check and repair the machine was unreasonable.

[14] We cannot agree with the Respondent's submission on the basis of evidence presented before us. When the Applicant refused to repair the machine, he did so on the basis that he did not have the required skill and competency to do so. He did not have the technical know-how to repair a machine that, according to him, could only be repaired by a person with a higher qualification than the one the Applicant held. This assertion by the Applicant was not challenged. What the Respondent did to make the assertion that the other

electricians had previously repaired bath water thermo-reactors and secondly that the Applicant was expected to perform a root cause analysis of the machine which was within his competency and within the employer's expectations as set out in his job description in terms of which he was expected to maintain factory machinery and equipment…" and find "root causes of machine failure."

[15] Firstly, the qualifications and the experience of the other two electricians were not revealed by the Respondent. There is no evidence that they hold the same qualification and experience as the Applicant. The Applicant's explanation that he was unqualified to repair the machine remain uncontroverted.

[16] Secondly, even if we accept that the Applicant's job description includes maintaining factory equipment and finding root causes of machine failure, my view is that such description does not oblige the Applicant to do that where the machinery requires technical competences he does not hold. We say, **"even if we accept**" because the Applicant denied that he received the documents when he was hired by the Respondent. The Applicant's evidence was that

the machine had an inscription that it would only be repaired by qualified technician was not seriously challenged.

[17] The offence of insubordination occurs where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. In this matter, the Applicant, having been given a machine to repair, advised that he was unable to do so because he did not have the necessary technical knowhow to repair a machine with an instrument component. He told his supervisor that he did not have the technical know-how to repair the machine. From the totality of the evidence led even performing a root cause analysis was beyond the Applicant due to his technical deficiencies. The machine itself had an inscription that a qualified technician repairs it. This was not a challenge of the employer's authority, in our view it was the employee pointing out his inability to perform the task given to him not because he was incompetent but because the machine required certain technical skills he did not have. In our view, this was not a challenge of the authority of the employer. In the circumstances we find that the Respondent did not have a fair reason for terminating the Applicant's services and that the dismissal of the Applicant was substantively unfair. We find that in all the

circumstances of the matter, it was unreasonable for the Respondent to dismiss the Applicant.

[18] The Applicant further challenged the procedural aspect of his dismissal. He complained that he was not given sufficient time to prepare for the hearing that he was not given an opportunity to state his case freely and challenge the evidence of the employee cross-examining witnesses because the initiator did not have any witnesses in proof of the charge against him.

[19] We are satisfied, on the evidence before Court including the minutes of the disciplinary hearing that the Applicant was given an opportunity to state his case and to question his supervisor who had in fact given evidence. It does appear that the Applicant was given short notice of the hearing but it seems to us that the short notice did not materially prejudice the Applicant. The matter was not a complex one and the facts thereof were largely common cause.

Applicant did not seek postponement of the matter on the basis of his being unprepared.

[20] What appears to have been unfair with regard to the hearing was the refusal to furnish the Applicant with the documents relied upon by the initiator being the job description. This is so because the Applicant evidence is that he had never received a job description.

[21] The evidence further shows that the Applicant was asked to mitigate before the verdict was given. The concept of mitigation refers to evidence brought by an employee that may persuade the chairperson to hand down a lighter penalty that would normally be imposed. In his book entitled Dismissal **(Juta 2014) at page 211 John Grogan** remarks as follows:

"Mitigation factors should be considered after the employee has been found guilty of the offence; whether there are mitigating factors constitute a separate enquiry.

In **Jethro Mabuza v Ngwane Mills (Pty) Ltd (305/2013) [2016] SZIC60 (December 02, 2016)**, the learned Nkonyane J. stated, *"The Constitution guarantees the right to a fair hearing. An employee who*

was not given an opportunity to influence the sentence by making representation mitigation of the sentence cannot be said to have had a fair hearing."

We agree with the Court's finding in this regard. The Applicant in casu mitigated before the sentence was delivered. Had he mitigated after the guilty finding perhaps he could have influenced the sanction given by the chairman.

[22] The final complaint regarding procedural fairness was that the sanction given was against that set out in the Respondent's Disciplinary Procedures. The schedule of possible offences (which is said to be used as a guide) states that at deliberate refusal to obey a lawful instruction (insubordination) attracts a final warning for a first offence and a dismissal a second offence.

[23] It is common cause that the Applicant did not have a final warning. His sanction should therefore have been a final warning. The chairperson did not appear as a witness before us and there was no explanation why she felt a dismissal for a first offence was necessary. It was the evidence of Msindazwe Dlamini that the chairman may have considered article II of the Disciplinary

Procedures, which lists wilful disobedience of lawful or reasonable orders... as an offence for which dismissal can be a sanction (with or without notice). The article states that this list is to be used as a guide and in conjunction with the schedule of offences.

[24] Our view is that all offences lead to a dismissal if they constitute gross misconduct. Secondly, in terms of the Disciplinary Procedure of the Respondent, dismissal can be a sanction for wilful disobedience where it constitutes a second offence (i.e. where the employee has previously been sanctioned for wilful disobedience). In the absence of the Chairperson's explanation of the sanction, we come to the conclusion that the Respondent, in dismissing the Applicant for the first offence of wilful disobedience acted outside its own disciplinary procedure.

[25] In the circumstances, the dismissal of the Applicant was both substantively and procedurally unfair. In terms of **Appeal Court Case No.2/2020 - Nkosinathi Dlamini v NDZ Consultative Company Ltd,** failure by the employer to apply a sanction that accords with the disciplinary code amounts to substantive measures.

[26] The matter that remains for adjudication is that of reinstatement vs compensation, Applicant sought reinstatement and indicated that he remained unemployed ever since the Respondent dismissed him. It was Respondent's submission that its witness, Ms Dlamini, had confirmed that there was no vacancy for a grade 2 electrician at the Respondent. It was submitted that the lack of a vacancy coupled with the time that had passed between the Applicant's dismissal and the hearing of the matter (some 8 years) rendered reinstatement impracticable. If was further submitted that Applicant had abandoned the reinstatement claim in favour of compensation in his evidence.

[27] Having considered the submissions by both parties, it appears that reinstatement would be impracticable for the following two reasons:

27.1 The Applicant himself indicated that he wanted the Court to order that the company pays him for his dismissal;

27.2 The time frame between dismissal and the hearing of this matter coupled with the Applicant's age. He stated that he was fifty-four years old.

[28] In the circumstances the Court will make the following order, having taken into account the Applicant's circumstances as led in evidence.

1. The Applicant is awarded of compensation equivalent to ten (10) months remuneration in the sum of E100 181.20
2. Additional notice pay E 11 094.44
3. Severance allowance E 27 235.40

Total **E 139 011.04**

Costs of the application are granted to Applicant.

The Members Agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr I. Mahlalela (Madzinane Attorneys)

For Respondent: Mr S. Dlamini (Musa M. Sibandze Attorneys)