



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 305/2013

In the matter between:

JETHRO MABUZA

Applicant

and

NGWANE MILLS (PTY) LTD

Respondent

Neutral citation: *Jethro Mabuza v Ngwane Mills (PTY) Ltd (305/2013)*
[2016] SZIC 60 (December 02, 2016)

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and P. Mamba
Nominated Members of the Court)

Heard submissions : 17/11/16

Delivered judgement: 02/12/16

Labour Law---Applicant appeared before a disciplinary hearing charged with negligence---Chairman finding Applicant guilty and meting out sanction of dismissal without affording the Applicant the opportunity to mitigate.

Held---The right to a fair disciplinary hearing requires that the accused employee be heard in mitigation before the sanction is meted out by the chairperson. Failure to do that renders the process to be procedurally unfair.

JUDGEMENT

1. The Applicant has applied to Court for determination of an unresolved dispute arising out of the Respondent's termination of his services.
2. The Applicant was employed by the Respondent in 1992 and he remained in continuous employment until 16th November 2011 when his services were terminated by the Respondent after a disciplinary hearing. At the time of his termination the Applicant held the position of Logistics Controller and was earning a salary of E6, 422.01 per month.
3. In his application the Applicant claims that he was unfairly and automatically dismissed by the Respondent. The Applicant further

stated in his papers that his dismissal by the Respondent was unfair and unreasonable in all respects including procedurally and substantively in one or more of the following ways:

- 3.1 *The Applicant was charged by a manager from another department who was not the Applicant's immediate supervisor.*
 - 3.2 *The false accusations and/or charges did not warrant that the Applicant be dismissed from his employment.*
 - 3.3 *The Applicant informed the disciplinary enquiry that there was no agreement that he should maintain a five-day stock level of yellow maize.*
4. The Respondent disputed the Applicant's claims. In its papers the Respondent stated that;
- 4.1 *The Applicant's dismissal was fair and reasonable in all material respects.*
 - 4.2 *The charges preferred against the Applicant were clear and comprehensible and the seriousness of the offence warranted the dismissal.*
 - 4.3 *The dismissal of the Applicant was procedurally fair because he was afforded his rights to a disciplinary enquiry when the disciplinary hearing against him was conducted.*

5. The Applicant was found guilty of negligence. He appealed. The decision was confirmed on appeal. The Applicant was not satisfied with the outcome and he reported the matter to the Conciliation Mediation & Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation and the Commission issued a certificate of unresolved dispute.
6. The evidence led before the Court revealed that the Applicant as Logistics Controller was responsible for ensuring that sufficient stock was readily available. The Respondent is a company that is largely involved in the production of animal feed in the country. The most widely used raw material is yellow maize. This product is sourced from South Africa. The production mill of the Respondent is operational for twenty four hours, seven days a week.
7. During the weekend starting from Friday 28th October 2011 there was a shortage of yellow maize. In order not to stop the mill operations, white maize was sourced locally from the National Maize Corporation (NMC). The Respondent incurred huge financial losses as white maize is more expensive than yellow maize.
8. On Friday 28th October 2011, it was stock taking day at the Respondent's place. Stock taking was done on every month-end. During the stock taking exercise no goods were received or dispatched until the end of the exercise. The stock taking exercise was completed at about 4:00 P.M on that day. After that, the production process started again. During the stocktaking exercise there were delivery

trucks that were waiting to deliver the raw material. The trucks were thereafter let in and delivered the raw material. After they had done that, the Applicant started to inspect the yellow maize stock to see if it was going to last through the weekend. He found that it was not going to be enough. He then started to panic and he called the Production Manager and the General Manger. The time was already after 5.00 P.M and these officers did not respond. He then sent text messages to them.

9. In his office, the Applicant found that the suppliers had already sent him an electronic mail (e-mail) enquiring as to how many truck loads would be needed for Saturday. This email came in at 3.07 P.M. The Applicant responded to it at 17:39 P.M. stating that he was sorry about the delay and that the supplier should send four truck loads for the following day on Saturday. The transporter refused to release his trucks when contacted, claiming that his trucks wasted the whole day parked at the Respondent's premises waiting to deliver.
10. The Applicant told the Court that he did not see the e-mail when it came in because he was still busy with the stock taking exercise. The Applicant was charged with negligence resulting from the failure to maintain sufficient stock levels of yellow maize and failure to balance stock levels. The Applicant pleaded not guilty to both charges. He was however found guilty on both charges. He was sentenced to dismissal on the charge of failure to maintain sufficient stock levels of yellow maze. He appealed, but the verdict and sanction were confirmed.

11. **ANAYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-**

The issue for determination by the Court is whether or not the dismissal of the Applicant was substantively and procedurally fair. Substantively, the Court will enquire if there was negligence on the part of the Applicant which led to the shortage of the yellow maize. Procedurally, the Court will enquire whether the Applicant was subjected to a fair disciplinary process before the dismissal.

12. In terms of the charge sheet, the Applicant's charge was framed as "*3(b) unsatisfactory work performance-negligence.*" The charge was amplified as follows:

- 1) *"You failed to maintain stock level of 5 days as agreed.*
- 2) *Failure to balance stock as agreed."*

13. There is a disciplinary code at the Respondents workplace. Article 3 (a) and (b) appears as follows:-

"OFFENCES

3. *Unsatisfactory work performance*

- a) *Carelessness.*
- b) *Negligence.*

In terms of the Code, the penalty for a first offence under negligence is a final written warning. For a second offence the penalty is dismissal.

14. It was not in dispute that the stock level for yellow maize during the weekend starting on Friday 28th October 2011 was low and could not take the Respondent through the weekend. The Applicant offered a number of explanations. Firstly, he told the Court that the cause of the shortage was due to the fact that on that day, that is, Friday 28th October 2011, it was stock taking day. He said on such occasions he becomes so busy that he would be unable to do anything else until the exercise was complete. He said he did not see the e-mail from the supplier that came in at 3:07 P.M on that day precisely for the reason that he was too busy and was not in his office.
15. The Applicant admitted that it was the Respondent's practice to take stock during the month end. This means therefore that he was not taken by surprise that he had to engage in the stock taking exercise on that Friday. Further, the evidence revealed that during the stock taking exercise in the previous months there were no reports or instances of shortage of stock for the weekend.
16. The evidence by the Applicant that he was so busy on that Friday such that he could not see the e-mail when it came in at 3.07 P.M was plausible when considering it in isolation. There was evidence

however that it was not the first or only e-mail from the supplier. The evidence revealed that the supplier had earlier communicated with the Applicant by e-mail dated 25th October 2011. This was on Tuesday. In terms of this e-mail the Applicant was being asked to update the supplier on capacity and tucks for the rest of the week. The evidence revealed that the Applicant did not take any action in response to this e-mail. During cross examination on this issue, the Applicant told the Court that he did respond to this e-mail and that his response had not be shown. When asked what he said in response, the Applicant said he had forgotten what he said. When questioned further, the Applicant said he did not recall how he responded but thought that he responded by telephone.

17. The second explanation that the Applicant gave was that the yellow maize was depleted before the end of the weekend because he could not order large quantities as there were not enough storage places for yellow maize at the Respondent's premises. He denied that there was a policy to keep yellow maize stock for five days' production. Respondent's witness RW1, Themba Nxumalo, told the Court that initially there was a policy to maintain yellow maize stock for three days production. He said this was revised to five days.
18. It will not be necessary for the Court to make a finding of fact on this issue. The Court says this because even if it were to accept the Applicant's version that there was no policy that yellow maize stock levels should be maintained for five days, it will take the Applicant's case no further as the evidence revealed that the available stock, even

- after the trucks had delivered, did not cover even the three days period stated by him. The Applicant admitted during cross examination that it was his duty to make sure that stock was always available.
19. It was also argued on behalf of the Applicant that had the trucks returned for delivery on Saturday 29th October 2011, there would not have been any shortage of yellow maize. It was argued that yellow maize was ordered by the Respondent almost on a daily basis. A schedule of yellow maize receipts was attached to the Applicant's heads of argument.
 20. Again, this argument takes the Applicant's case no further. To the contrary, it serves to prove the Applicant's inefficiency and negligence. If indeed yellow maize was delivered or bought almost every day, the Applicant failed to show the Court that he had placed an order for Saturday and Sunday. The Applicant failed to do that even when he knew that he was going to be busy with stock taking on Friday. The Applicant only started to make hasty arrangements after he had seen the e-mail by the supplier asking how many trucks for Saturday.
 21. The Court will therefore come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant fell short of efficiently discharging his duties on that weekend, which resulted in the shortage of stock of yellow maize in circumstances that amounted to negligence.

22. The next issue for the Court to decide is whether the Applicant's dismissal was procedurally fair. The evidence before the Court showed that during the disciplinary hearing the Applicant had a written warning which he got in July 2011 after a disciplinary hearing for a similar charge of negligence. The written warning was valid for six months. It was therefore still active in November 2011 when the Applicant was found guilty of negligence. Although in terms of the code the penalty of negligence under 3(b) for a first offence is a final written warning, the chairperson however used his discretion and entered the sanction of a written warning. It means therefore that at the time that the Applicant was found guilty of negligence in November 2011, he did not have a final written warning in his personal file, but he had a written warning.
23. As the Applicant did not have a final written warning in his personal file, it was wrong in principle to mete out the sanction of dismissal. The Applicant also told the Court that he appealed against the sanction. This evidence was not disputed by the Respondent. There was no evidence that the appeal against the written warning was entertained by the Respondent.
24. Further, in terms of Article 3.10 of the Code, "*an employee who commits a related offence whilst he has a valid written warning will receive a final written warning.*" In *casu*, the Applicant had a written warning. It follows therefore that the appropriate sanction in this case was a final written warning. The dismissal of the Applicant

was therefore procedurally unfair as it was in violation of Article 3.10 of the Respondent's Code.

25. The evidence also revealed that the Applicant was not afforded the opportunity to mitigate. This was one of the grounds of appeal by the Applicant. The appeal chairperson decided to send the matter back to the chairperson of the disciplinary hearing to hear the mitigating and aggravating factors. After hearing the parties, the chairperson came to the same conclusion. The Respondent's attorney argued that the failure to afford the Applicant the opportunity to mitigate did not necessarily amount to procedural unfairness. He relied on the case of **Sabelo Gule V. Inyoni Yami Swaziland Irrigation Scheme, Case No. 31/04 (IC)**. In paragraph 46, this case, this Court dealing with this question held that;

“But in our view the failure to hold a two-stage enquiry does not necessarily amount to procedural unfairness provided that the employee has been afforded the opportunity at some stage during the enquiry to make representations in mitigation of sanction.”

The Court in that case relied on the case of **Eddels (SA) (Pty) Ltd v Sewcharan & Others (2000) 21 ILJ 1344 (LC)**. The **Eddels** case was decided in **2000** before the Constitution of Swaziland came into effect. The Constitution guarantees the right to a fair hearing. An employee who was not given the opportunity to influence the sentence by making representations in mitigation of the sentence cannot be said to have had a fair hearing. For this reason also, the dismissal of the

Applicant was procedurally unfair. Seeing this anomaly, the matter was referred back to the chairman of the disciplinary hearing by the appeal chairman. The disciplinary hearing chairman however, having heard the matter, issued the verdict and meted out the sanction had become *functus officio*.

26. In the circumstances, the Court will come to the conclusion that the dismissal of the Applicant was procedurally unfair.

27. **RELIEF:-**

The Court will take into account that the Applicant is a family man. He had served the Respondent for nineteen years when he was dismissed. He was unable to get full time employment after his dismissal. He told the Court that he had just secured temporary employment about two months ago. The Applicant having succeeded only on one aspect of the unfairness, that is, procedural unfairness, the Court will make an order that the Respondent is to pay half of the Applicant's costs of suit. Taking into account all the circumstances of this case the personal circumstances of the Applicant, the interests of justice and fairness, the Court will award the Applicant an amount equivalent to six months' pay as compensation.

28. The Court will accordingly make an order that the Respondent is to pay the Applicant the following:

a) *Compensation (E6,422.01 x 6) = E38, 532.06*

b) *The Respondent is to pay half the costs of suit of the Applicant.*

29. The members are in agreement.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT:

**MR. A. FAKUDZE
(LABOUR LAW PRACTITIONER)**

FOR RESPONDENT:

**MR. B. GAMEDZE
(MUSA M. SIBANDZE ATTORNEYS)**