IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO.156/2010

In the matter between:-

BHEKI SHABALALA **APPLICANT**

AND

MALOMA COLLIERY XSTRATA **RESPONDENT**

Neutral citation: *Bheki Shabalala v Maloma Colliery Xstrata (156/10) [2017] SZIC 27*
(27 April 2017)

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

Last Heard : **09 MARCH 2017**
Delivered : **27 APRIL 2017**

Summary: *Labour Law - Unfair Dismissal – Applicant alleges unfair dismissal by Respondent following by a disciplinary enquiry. Held – Employer bears the burden of proving that taking into account all circumstances of the case it was reasonable to terminate the services of the employee. Held – In Casu the Respondent Employer has failed to prove that the dismissal of Applicant was reasonable.*

1. The Applicant, Bheki Shabalala, is a former employee of Maloma Colliery Xstrata, the Respondent in these proceedings. His evidence was that he was employed by the Respondent on 18 August 2008 until February 2010, when he was unfairly dismissed. He now claims against the Respondent company the following; a) notice pay, b) 18 days leave, c) 18 months overtime and d) maximum compensation for the unfair termination of his services. The Respondent company on the other hand vigorously opposes the claims of the Applicant, contending instead that his dismissal was procedurally and substantively fair, hence it contends that it is under no obligation to pay the Applicant's claims. The matter is now before this Court for determination of this dispute of the parties.

2. The case of the Applicant, according to his testimony, can be summarised as follows; he was employed by the Respondent as a Boilermaker in August 2008, and that upon engagement he signed a contract of employment. He stated that in December 2009, he was suspended by the Human Resources Manager and subsequently taken through a disciplinary hearing which eventually culminated in the termination of his services in February 2010. At the disciplinary hearing he was facing a charge theft of a welding machine which was apparently discovered in his possession. He denies the allegations

against him stating instead that this was all a fabrication and was only meant to get him dismissed from the company.

3. He punched holes in the evidence adduced against him at the disciplinary hearing, literally denying that the incident of him allegedly stealing the said welding machine ever occurred at all. He stated that the allegation was that he had put the machine in a sack together with rations but at his hearing the alleged sack was never produced as part of the evidence. He further stated that another allegation against him was that when he was caught out he attempted to bribe the Security Officers with an amount of E100 but that at his hearing this money was also never produced as an exhibit. He also pointed out that the allegation against him was that the incident occurred on 10 December 2009, but in the security guards' occurrence book it was only recorded on 12 December 2009, when he was already on suspension, having been suspended on 11 December 2009.

4. At his hearing when he asked for the machine he allegedly stole to be presented as part of the employer's evidence, it was indeed so presented. This baffled him because as far as he was concerned he had locked the welding machine in his locker and was surprised as to how anyone could

have accessed it without him. He denied that he was caught out by the security guards stealing the machine, insisting that such an incident never occurred at all. He testified that the welding machine had always been under his custody and that he kept it in his locker. For this offence he had been charged together with Sonnyboy Dlamini, who was an Assistant Boiler Maker, and they were both dismissed. He stated as well that he could not have stolen the welding machine with Sonnyboy because on the day in question this Sonnyboy had knocked off from his shift at 4pm whilst he knocked off at 6pm. When Sonnyboy knocked off, he (Applicant) was still using the very same welding machine he is alleged to have stolen and had left it safely locked away in his locker.

5. The Applicant further testified that there was clandestine move to get him dismissed from the company after an incident in which he charged and called to appear before a disciplinary hearing in October 2009. He was acquitted after this hearing. The Plant Superintended, a certain Mr. Corbert, was not happy with his acquittal, accusing the Applicant of trying to have his countryman dismissed, and he vowed to ensure that the Applicant was dismissed. Indeed the Applicant was subsequently charged on what he calls

fabricated charges and ultimately dismissed, hence this present application for determination by this Court.

6. On his claim for over time, the Applicant clarified that he worked for 10 hours a day, whereas the company policy was that employees worked 9 hours per day and that anything in excess of the 9 hours would be paid as overtime. In this regard he referred the Court to minutes of a meeting held in April 2008 where this was discussed.

7. Under cross questioning by the Respondent's Counsel the Applicant maintained that he did not know anything about the alleged welding machine he is said to have been caught out by security guards trying to steal. He stated further that the first time he got to know of the incident was when he was approached by the Human Resources Manager on 11 December 2009, when he was suspended. The Human Resources Manager informed him that the welding machine that he had been caught trying to steal was the one assigned and used by him, he was surprised at this as he did not know anything about this allegation and that it had disappeared.

8. When referred to the document A2, a copy of the occurrence book in which the incident was recorded, the Applicant pointed out that the incident was

recorded on 12 December 2009, a day after his suspension and 2 days after the incident allegedly took place. He reiterated that this was all made up to get rid of him since he was not in good terms with Corbert. That was the Applicant's case.

9. First to testify in support of the Respondent's case was Sipho Sikhondze. He testified that in December 2009, the Applicant and Sonnyboy Dlamini approached the gate where he was stationed on the day, the vehicles gate, carrying a big white sack, which looked heavy. He, together with his colleague, Sibusiso Mavimbela, got suspicious of what they could be carrying and asked to search inside the sack. On conducting the search, they discovered that there were food rations and underneath the rations was a welding machine. He asked them where they were taking the welding machine and the Applicant's response was that he had been given the machine by his supervisor Corbert. When this witness asked for a gate pass allowing him to take the machine out of the mine he failed to produce same but instead tried to bribe them with E100 to allow them to leave with it and not to report about this incident. He together with his colleague then confiscated the welder from the Applicant. This witness testified that what made him suspect that they were stealing the machine was because it was

hidden underneath the food rations in the sack, the fact that they failed to produce a gate pass, the attempt to bribe them and the fact that they were using a gate designated for motor vehicles and not pedestrians.

10. He further testified that they handed the welder to their supervisor Sifiso Mhlanga. The next day they confronted Corbert to ask whether he had given the Applicant authority to leave with the welder and he denied having done so. The Applicant was subsequently charged and taken through a disciplinary process where he was called as a witness. When referred to the recording in the occurrence book, this witness clarified that he had recorded the incident in in his own recording book and the supervisor, Mhlanga, then transferred it to the occurrence book on 12 December, 2009, interestingly though he never produced his personal recording book.

11. Under cross examination by Attorney Mr. Zwane on behalf of the Applicant, this witness testified that when they confiscated the welder, photographs of it were taken and it remained at the guard house at the gate and was produced at the hearing against the Applicant. He also testified that they also confiscated the food rations. When Attorney Zwane brought it to his attention that what he was telling the Court was now at variance with what

he said at the hearing, this witness blamed it on the time that had elapsed since the incident took place. He insisted though that the incident did occur.

12. The second witness for the Respondent was Sifiso Mhlanga. He testified that he is employed as a Chief Security Officer by Lumber Security company, a company that rendered security services to the Respondent mine. In 2009 though he held the position of Senior Security officer and according to him all security guards reported to him. Like the first witness, he testified about how the Applicant had tried to steal a welding machine when he was caught out by the security guards manning the gate reserved for vehicles. He also testified about the attempt to bribe the security officer with E100.

13. According to this witness after the welding machine was confiscated it was taken to the workshop where it was kept. The head of the department where the machine was stolen was informed and he requested to see same. When they went to where it had been kept it was no longer there. The Applicant had apparently deceived the security guards into releasing it to him under the guise that he wanted to use it. Upon further investigation it was discovered that the Applicant had locked it in his locker. The Applicant's locker was opened and indeed the welding machine was found inside. This witness

further testified that the incident had not been recorded in the occurrence book and he subsequently recorded it two days later as an omitted occurrence.

14. Under cross examination this witness insisted that the incident in question occurred and stated that they had no reason to fabricate same. When asked as to what had happened to the food rations that were in the sack with the machine, this witness testified that they were released to him since they were perishables. This was contrary to what the first witness had told the Court.

15. The last witness to testify for the Respondent was Harry Hillary. This witness' testimony was basically in relation to the contentious overtime pay. He testified that he, together with the Applicant and two other employees were engaged by the Respondent at the same time. They were previously employed by Illovo. At Maloma Colliery they worked the same number of hours and were remunerated at the same rate with the Applicant. They worked 10 hours per shift. This 10 hour shift was communicated to them when they were engaged. He testified as well that he still works the 10 hours to this day.

16. Witness Hillary further testified that after their first pay, they learnt that the other employees, who were also working this 10 hour shift, were being overtime for the extra hour they worked. These had been employed before they were engaged in August 2008. When they got to know that the other employees were paid overtime for this extra hour, they started engaging management for payment of overtime to them as well. However, management informed them that they could not be paid because in their case this extra hour was included in their monthly package, and that this was consistent with their contracts of employment they had signed. They even took up the matter with their union but got the same response. They were not happy with not being paid this extra hour as overtime and pursued it further, even after some of the others they were engaged with had left.

17. In 2011, a new mine manager was engaged to replace Breytenbach, the previous mine manager. This new mine manager was Du Plessis. This witness and the two remaining employees engaged in August 2008, continued pursuing this issue of the extra hour. It would seem their persistence paid off because in July 2011, Breytenbach approved payment of this extra hour as overtime. However, this payment was with effect from that

very month of July 2011. It was not backdated. That was the Respondent's case.

18. In his closing submissions, the Applicant's representative, Attorney Mr. Zwane submitted that the Applicant was dismissed on trumped up charges. He insisted that the allegation that his client tried to steal and smuggle out of the company premises a welding machine were a fabrication. He raised a number of issues which he said could were contradictory or could not be satisfactorily answered.

19. In relation to the rations for instance, Attorney Zwane pointed out that the evidence of Sipho Sikhondze before this Court was that they were confiscated together with the welder and given to Sifiso Mhlanga. This evidence, according to Zwane, contradicts what the same Sikhondze informed the Chairperson of the Applicant's disciplinary hearing, where he said the Applicant was allowed to take the rations away because they were perishable. Attorney Zwane also pointed out that at the Applicant's disciplinary hearing Sikhondze stated that when they searched the sack carried by the Applicant and his colleague they found the welder and cables,

whereas another witness, Sibusiso Mavimbela stated that there was only the welder.

20. Zwane also took issue with the fact that the incident in question was not recorded in the occurrence book on the date it is alleged to have happened but was only recorded two days later.

21. Another issue raised in closing by the Applicant's Counsel was that of where exactly the welder was kept after being confiscated by the security guards on 10 December 2009. In this regard Zwane submitted that there was a contradiction between the evidence of Sikhondze and Mhlanga. The version of Sikhondze was that the welder was kept at the guard house at the gate when the Applicant came the next day and took it away on the pretext that he was going to get a gate pass for it. Mhlanga on the other hand stated that he had kept the welder in a cage in the workshop and that the Applicant tricked the security guards to release it to him from there.

22. In concluding, Attorney Zwane submitted that there was no evidence to prove that the Applicant stole the welder. This, according to him, is because the evidence indicates that the welder was found inside the company premises and in the Applicant's locker after he had been suspended. The explanation for the welder being found in the Applicant's locker is that after his suspension, he locked all his tools in the locker and left.

23. On behalf of the Respondent, Attorney Dlamini submitted that the Applicant's evidence and version is fraught with contradictions and inconsistencies and therefore unreliable. Attorney Dlamini started off by pointing out that the Applicant's contention that the alleged theft was a fabrication and victimisation is not consistent with the probabilities because the information came from an independent security company which could not be compromised so as to falsely accuse the Applicant. Dlamini also submitted that since the Applicant's colleague was also dismissed for the same offence, does this then suggest that he was also victimised?

24. According to Attorney Dlamini, the employer's version is consistent with the probabilities in that both the Applicant and his colleague were positively identified by the security guards at the gate in possession of the welder. The

Respondent's Counsel also took issue with the fact that the Applicant was not able to point to any contention in the minutes of the disciplinary hearing where he denied stealing the welder.

25. Then in relation to the Applicant's claim for overtime, the Respondent's Counsel submitted that the claim is primarily based on minutes of a meeting which was held before the Applicant was employed. In that meeting it was stated that if an employee worked 10 hours then he was entitled to be paid 1 hour as overtime. Attorney Dlamini pointed out that the Applicant was not part of the employees referred to in the minutes. He also referred the Court to clause 22 of the Applicant's contract of employment which stated that his hours of work would be determined by the mine manager. He mentioned as well that the salaries of the Applicant and his colleagues were relatively higher than those of the other employee.

26. On the leave claim, the contention by the Respondent's Counsel was that since the Applicant conceded that he was paid the amount of E2,733.37 as discharge leave, then he had to justify how his claim for 19.11 days arose. This according to Attorney Dlamini the Applicant has failed to do. Dlamini

further submitted that the Applicant was on leave during the Christmas break.

27. Perhaps as a starting point one needs to point out that in this matter the Court is faced with two mutually destructive versions from both litigants. When faced with such a scenario the proper approach is for the Court to apply its mind to the merits and demerits of all the evidence before it together with the probabilities thereof. Thereafter the Court would then be justified in reaching a conclusion which will dispose of the matter.

28. Eksteen AJP, in ***National Employers' General Insurance v Jagers 1984 SA (4) 437 at 440 D – G*** stated as follows;

> "*It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test*

the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

29. In terms of our labour law the burden of proof rests with the employer in cases of alleged unfair dismissal. In terms of section 42(2) of the Employment Act, 1980, the services of an employee shall not be considered as having been fairly terminated unless the employer proves that; (a) the reason for the termination was one permitted by section 36, and (b) that taking into account all the circumstances of the case it was reasonable to terminate the service of the employee.

30. As stated earlier, the Applicant was dismissed based on allegations that he was caught in possession of a welder trying to smuggle it out of the Respondent's premises. The Applicant vehemently disputes the allegations against him. He says no such incident ever occurred and that the allegations

against him were made up by the employer because they wanted to get rid of him. He says he was not in good terms with a certain manager by the name of Corbitt, who had informed the Applicant that he would make sure that he (Applicant) was dismissed from the mine after he got his countryman into trouble.

31. The Court has carefully weighed up and tested all the evidence against the general probabilities and in doing so probed the following issues;

Date of the incident.

The allegation by the employer is the incident occurred on 10 December 2009, whereas it was only recorded in the occurrence book on 12 December 2009, which was two full days after the incident had occurred. There was also another allegation that the Applicant came back the next day, 11 December 2009, and took the welder away under the pretext that he needed to use it in executing his duties. Again this incident was not recorded in the occurrence book on 11 December 2009, but was only recorded on 12 December 2009. In the view of the Court the occurrence book is very important book in the security division of the Respondent. It is where the security personnel record all daily occurrences in the mine for future reference. What baffles the Court is why these two very critical occurrences

relating to the allegations against the Applicant were not captured on the dates they are alleged to have occurred? Was it a mere coincidence that both were not recorded? A careful analysis of the occurrence book indicates that incidents and occurrences were recorded hourly. But in the case of the Applicant this never occurred. There is therefore this lingering doubt in one's mind as to whether such incident did occur in the first place.

32. ***Food rations in sack.***

There is also the allegation that the Applicant had hidden the welder underneath his food rations in the sack he was carrying. The evidence of Sipho Sikhondze, the first witness to testify in support of Respondent's case in this Court, was that the food rations together with the welder were confiscated from the Applicant and given to the security supervisor, Sifiso Mhlanga. However, when witness Sifiso Mhlanga took the stand he informed the Court that the food rations were released to the Applicant by the security officers who apprehended him since they were perishable. The evidence of Sifiso Mhlanga directly contradicts that of Sipho Sikhondze on this aspect. There is yet another contradiction in the evidence of what witness Sipho Sikhondze informed this Court and what he stated at the disciplinary hearing on the food rations. At the disciplinary hearing the

minutes indicate that he informed the Chairperson that the sack was carrying cables and the welder only. These contradictions the Court cannot ignore.

33. ***<u>What happened to the welder after it was confiscated?</u>***

This is yet another contradiction in the evidence of the Respondent. At the disciplinary hearing of the Applicant Sipho Sikhondze informed the hearing that the welder was kept at the guard house until the next morning when it was taken by a certain Quinton to do some work in the mine. However before this Court he testified that the welder remained at the guard house, photographs of it were taken and on the day of the hearing it was taken to be part of the evidence at the hearing. On this issue, the evidence of Sifiso Mhlanga was that the welder was taken from the guard house to the workshop where it was kept in a tools' cage. He testified that the Applicant then went to the workshop where he took same and locked it up in his personal locker. This is yet another contradiction which goes to the heart of this matter and which the Court cannot ignore.

34. The evidence of the Applicant, before this Court and at his disciplinary hearing, has always been consistent. He has consistently denied that the

incident in question occurred at all. Before this Court for instance, his testimony was that on the day in question he knocked off at 6pm whilst his colleague Sonyboy Dlamini, knocked off at 4pm, two hours before him. The least the Respondent could have done was to bring proof that on the day in question he knocked off at 4pm, in line with its evidence. But no such evidence was forth coming.

35. From the totality of the evidence before this Court and its analysis, it is obvious that the evidence of the Respondent has a myriad of contradictions and shortcomings and is therefore unreliable. The balance of probabilities in this matter are tipped in favour of the Applicant. The finding of the Court is that the evidence of the Applicant is more probable than that of the Respondent. This in effect means the Respondent has failed in discharging the onus of proof it was burdened with. For that reason the Court concludes that the dismissal of the Applicant was substantively unfair. The Applicant did not complain about the procedural aspect of his dismissal and from the evidence adduced, there is nothing to indicate that his dismissal was procedurally flawed.

36. There is then the Applicant's claim for 18 months overtime. He claims that he worked 10 hours a day, whereas the company policy was that employees worked 9 hours per day and that anything in excess of the 9 hours would be paid as overtime. For this claim he relied on minutes of a meeting held in April 2008 where this issue was discussed. To start with, the Court points out that the minutes he referred to were even before he was employed. The minutes relate to two employees who were complaining that they were not being paid overtime, and not the Applicant since he was only engaged in August 2008. So he cannot seek to rely on the minutes for the payment of this claim.

37. The Court points out as well that the relationship of the parties was regulated by a contract of employment. This contract at clause 22 provided that the hours of work of the Applicant would be determined by the Mine Manager. The effect of the parties of reducing the terms of their contract into writing is very significant. Zeffert *et al* in their writing **'*The South African Law of Evidence (formerly Hoffman and Zeffert), Lexis Nexis, 2003, at page 322*** state thus;

"If, however, the parties, decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is inadmissible."

38. In ***National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975 (3) SA 16 (A) at page 26***, Botha JA in quoting the writings of ***'Wigmore on Evidence'***, where it is stated;

"This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act i.e. its formation from scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." See also Venter v Birchholtz 1972 (1) SA 276 (AD) per Jansen JA.

39. In view of the above position of the law, a question which then arises is whether the Applicant can seek to rely to anything else other than that which is contained in the contract of the parties? Clearly he cannot. Instead he must be held to the terms of the agreement signed between the parties and nothing outside of it. This is what the solicitudes of public policy demand. To that end therefore, the claim of the Applicant for 18 months overtime should fail.

40. Finally there is the claim for leave, in which he claims 18 days leave. In relation to this claim the Respondent's defence is that the Applicant took his leave when the company closed for the December vacation. That defence though cannot hold. The evidence before Court clearly indicates that the Applicant was suspended on 11 December 2009. One of the terms of his suspension notification was that he was not allowed in the company premises whilst under suspension. There is no evidence that his suspension was ever lifted until his dismissal. It cannot be therefore that the Respondent can argue that he was on leave when he was under suspension. The Applicant's claim in this regard ought to succeed. Evidence before this Court indicates that he was paid an amount of E2,733.37 as leave when he

was dismissed. In this regard the Court directs that this amount be deducted from his 18 days leave claim.

41. The Applicant worked for the Respondent for slightly less than 18 months. It took him a year to secure alternative employment. Taking into account all the evidence and circumstances of the case, the Court accordingly makes the following order;

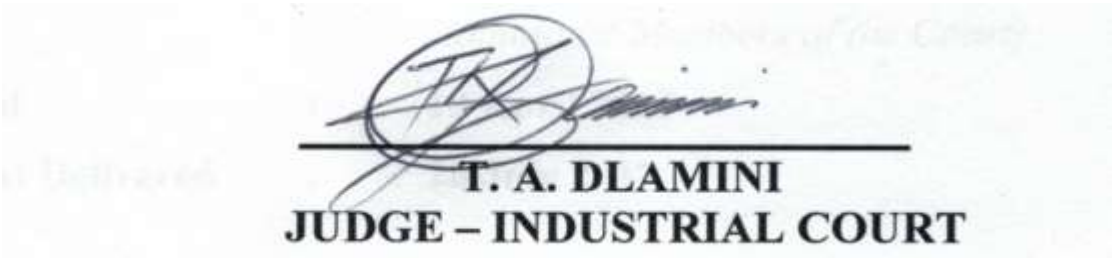
a) The termination of the Applicant's services by the Respondent was substantively unfair and therefore unreasonable in the circumstances.

b) The Respondent is hereby ordered and directed to pay the Applicant as follows;

i) Notice Pay	***E 19,915.74***	
ii) 18 days leave		***E 16,290.00 *(less E2,733.37)***
iii) 5 months Compensation	***E 99,578.70***	
Total :		***E 133,051.07***

42. The payment aforementioned is to be made forthwith. The Court also makes an order that the Respondent pays the Applicants costs.

The Members agree.



T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 27TH DAY OF APRIL 2017.

For the Applicant : Attorney Mr. B. Zwane (BZ Attorneys).
For the Respondent : Attorney Mr. S. Dlamini (Magagula Hlophe Attorneys).