IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 26/2014

In the matter between:

AARON MKHATSHWA Applicant

And

HAPPY VALLEY HOTEL & CASINO Respondent

Neutral citation: Aaron Mkhatshwa v Happy Valley Hotel & Casino [26/2014] [2020] SZIC 70 (17 July 2020)

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

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

Date Heard: 12 April 2019

Date Delivered: 17 July 2020

JUDGMENT

[1] The Respondent carries on the business of hotel proprietor and operator in the kingdom of Eswatini. It owns and operates the Happy Valley Hotel and Casino in Ezulwini, district of Hhohho.

[2] The Applicant was employed by the Respondent in December 1985 as a Stock-taker. He remained in the continuous employ of the Respondent until 5th April 2013 when he was dismissed. At the time of his dismissal he held the position of Night/Security Manager and earned a monthly salary of E9008.50 (nine thousand and eight Emalangeni fifty cents).

[3] The Applicant, in his papers claims that his dismissal was both substantively and procedurally unfair and claims the following:

3.1 Notice pay	E 9008.50
3.2 Additional Notice Pay	E 36 033.92
3.3 Severance Pay	E 90 084.80
3.4 Leave Pay	E 11 087.36
3.5 Maximum Compensation for unfair dismissal	E 108 102.00
Total	**E 254 316.58**

At the hearing of the matter he abandoned the leave pay claim on the basis of his admission that he had been paid the outstanding leave. His total claim is therefore E 254 316.58 (Two hundred and fifty-four thousand three hundred and sixteen Emalangeni fifty-eight cents. He also claims costs of the proceedings.

[4] The Applicant gave evidence at the trial. He was the only witness led in proof of his case. He stated that his difficulties with his employer arose after he was accused of allowing a private investigator to carry out some investigation within the hotel premises thus disturbing guests who had booked into the hotel.

[5] In his evidence in chief the Applicant testified that at or about 10.30pm on the 21st January 2013, a private investigator came to the hotel and sought to carry-out an investigation into allegations that one Manager was abusing junior female staff by forcing them to sleep with him in the rooms hired out by the hotel. He allegedly told Applicant that one of the directors of the hotel had sent him and that the suspected manager was there and then at that particular time, on the premises and in one of the hotel rooms carrying out his dastardly deeds, despite

that he had knocked off at 1700 hours and was supposed to be away from the premises.

[6] It was the Applicant's evidence that he refused to entertain the private investigator and refused him entry into the hotel. He asked for his authority to carryout the investigation. The private investigator then showed Applicant the director's cellular telephone number (which Applicant recognised) and then called same. Applicant testified that he then spoke to the director on the investigator's cellular phone and was told to allow the investigator to carry out his investigation. The director, Applicant testified, indicated he would also be coming to the hotel later.

[7] It was after talking to the director that Applicant testified he allowed the investigator into the hotel. He testified that he took the investigator to reception where he (the Applicant) took keys to hotel's un-booked rooms. He walked towards the steps leading to the rooms and handed the keys to the to Security guards that he had detailed to go with investigator. The Security guards were directed by the Applicant to open the un-booked rooms for the investigator. After

about fifty minutes the investigator returned and stated that he had failed to find the person they were looking for but his car was still on the premises. He then left.

[8] It was the Applicant's testimony that the director came to the hotel almost immediately after the investigator left and called Applicant to the car park. He asked how the investigation had gone and Applicant told him that the person sought had not been found but that his car was still parked at the back of the hotel; that the investigator had said that the bed in room 39 was unmade, giving the impression that it had been used, but there had been no one in the room when he and the security guards went in. The director was identified by the Applicant as Mr Pedro Rodriquez.

[9] The Applicant told the Court that after this incident with the private investigator, and on or about February 2013, he was notified of a disciplinary enquiry to be held against him on charges of Gross Negligence (failure to execute work with senior or potentially serious consequences for the Company);Breach of confidentiality and Gross insubordinate/defiance of authority. The hearing was held from 14th February until 25th March 2013. On 5th April 2013, the Applicant

received notification of termination of employment in which he was advised of his right to appeal. He exercised his right to appeal successfully with the appeal chairmen coming to the conclusion that in the interests of fairness the appellant would have his disciplinary hearing start *de novo* before the appeal chairmen, Mr Skhumbuzo Simelane and Luigi Rosi. It was also decided that there would be no right to appeal the decision of the *de novo* disciplinary hearing. At trial Mr Luigi Rosi, giving evidence on behalf of the Respondent, told the Court that the decision not to have an appeal was based on the fact that he was the most senior manager of the Respondent and would sit on the *de novo* hearing. It would not be possible, he testified, for the Applicant to appeal to a high authority if he needed to, because the highest authority would have sat at the disciplinary hearing.

[10] It is common cause that the disciplinary hearing was set for 22nd May 2013 at 9:00 hours and that the Applicant and his attorney did not attend. The hearing proceeded in their absence. The Applicant explains his absence by saying that his attorney told him not to attend the hearing because the attorney had spoken to Mr Fakudze (the

initiator of the disciplinary hearing) about his unavailability because of a High Court engagement. It is on the basis that he was not at the hearing that the Applicant alleges his dismissal was procedurally unfair. He alleges that by continuing to hold the hearing in his absence whereas his attorney had indicated his unavailability, he was denied his right to be heard and to cross examine witnesses prior to an adverse decision being made against him. It was submitted on behalf of the Applicant that it was improper, unlawful and/or unfair for the disciplinary chairperson to proceed with the hearing in Applicant's absence in premises where there was a genuine reason for the Applicant's attorney's absence as Applicant himself. The case of **Mandla Dlamini and Manzini City Council v Musa Nxumalo Appeal Case No. 10/2002** was cited in support of that submission.

[11] The Respondent is in agreement with most of the facts set out by the Applicant. It did however, point out some material differences which it raised in the cross-examination of the Applicant:-

11.1 The Respondent put to issue that Applicant had been instructed by its director Pedro Rodriquez to allow the private investigator, to carry-out the investigation; to allow him to enter hotel rooms.

This aspect of the Applicant's evidence was said to be an after thought because firstly it differed with the sequence of events he, himself, narrated in a statement made on the 21st January 2013. In that statement Applicant stated that Mr Rodriquez arrived at the hotel at about 10pm and asked how security at the hotel was. There was no mention of the later visit by Mr Rodriquez in the statements; nor was there any mention of the instruction to allow the private investigator to investigate and enter the hotel rooms. When he was asked why he had not mentioned being instructed by Mr Rodriquez to allow access to the hotel rooms to the investigator or his alleged visit to the hotel late on 21st January 2013, Applicant stated that he had been asked not to mention the instruction. He admitted to not making mention of the said Rodriquez instruction at the disciplinary hearing that was subsequently set aside. He said that Mr Rodriquez had asked him to keep the investigation a secret.

[12] Applicant was also questioned about the actual acts of going into the hotel rooms. It was put to the Applicant that he had given three versions of what took place ion this regard on the night in question –

(i) that in his report, written a day or so after the event, he had written that he went to the rooms and opened them with the private investigator;

(ii) that at the disciplinary hearing that was subsequently set aside he had stated that he had gone to the rooms with the investigator and the security and had left them at the rooms upon not finding anyone in the first room opened; and

(iii) that, in chief, he had said he did not go to the rooms with the investigator but that he had given keys to empty rooms to hotel security and directed then to go with the private investigator.

[13] The Applicant was unable to explain the three versions but insisted that he had not gone to the rooms with the investigator and the hotel security. It was his testimony that his evidence in chief represented the correct version and sequence of the events that took place on the 21st January 2013.

[14] The Applicant was also cross-examined about the Respondent's policy on the privacy of its clients. He acknowledged that privacy of hotel guests was of extremely high importance and that the Respondent's guests were not to be disturbed by anyone unduly.

[15] With regard to the final disciplinary hearing, Applicant admitted that he had been notified timeously of the hearing. When asked why he did not attend the hearing his response was that his attorney told him he had asked for the hearing to be postponed and that he need not attend. He admitted that the chairman of the hearing, one Mr Rosi had called him on the morning of the hearing to tell him that he needed to appear at the hearing. His evidence was that he had told Mr Rosi that his attorney had called Happy Valley to say he was unable to attend the hearing because of another engagement. He had advised the Applicant not to attend the hearing because he would be unrepresented. He denied being told by Mr Rossi that the hearing could proceed in his absence, if he refused to attend.

[16] Finally, the Applicant testified that he had heard from his attorney that the hearing had continued in his absence and that he had subsequently been dismissed.

[17] The Respondent led two witnesses in proof of its case. The first witness, Mlungisi Zakhele Shongwe, told the Court that he was an employee of the Respondent and had been since 2008. He stated

that he was employed as a night auditor at the front office. He recalled that on the night of 21st January 2013, he was at work having clocked in at 10pm. He recalled that at 10:30pm or so the Applicant approached him and asked for a rooming list. He took the list and left. The witness explained that a rooming list was a list of the occupied rooms with guest names. He testified that the Applicant returned and was now with the private investigator. He asked for the Master key. When he was asked why he wanted the Master key, the Applicant explained that he wanted to investigate the use of rooms by people who had not booked them or who were unknown to the hotel. He testified that Applicant left with the investigator for about thirty minutes and that they came back together. Applicant then left the Master key at the front desk while the investigator left the premises. He did state that he was not sure of the time taken by the Applicant and the investigator to carry out their investigations. He stated that after taking the key, Applicant left with the investigator and went in the direction of the rooms.

[18] In cross-examination Mr Shongwe stated that he could not say that the Applicant went to the rooms because he did not see him there but

he could only say that Applicant had stated that the investigator and he were going to carry out an investigation and that they had left together heading in the direction of the rooms together with hotel security.

[19] To a question asked by the Court the witness stated that he had given evidence only on the 1st hearing and had not done so at the 2nd hearing of 22nd May 2013, the *de novo* hearing.

[20] The Respondent then led one Luigi Rosi, who testified that he was employed at Happy Valley as General Manager and that one of the first things he had to attend to upon his appointment by Respondent was the issue of the Applicant's appeal; that he co-chaired what he called Applicant's appeal hearing. Upon further questioning he explained that he was referring to the hearing of 22nd May 2013 which was, in fact the Applicant's disciplinary hearing. He then explained that the Applicant had appealed against the findings of his first disciplinary hearing on the basis that there was collusion at the first hearing. The appeal decision was that the disciplinary hearing be started afresh before the appeal chairmen. He testified that the Respondent decided that Applicant would be brought before himself

(Luigi Rossi) and one Skhumbuzo Simelane, as co-chairmen of the hearing on 22nd May 2013.

[21] He testified that on 22nd May 2013 the Applicant did not attend the disciplinary hearing. Nor did his representative, his attorney. His testimony was that, the initiator advised the chairman he had received a telephone call from the Applicant's attorney at about 8:45am on the 22nd May 2013 (the day of the hearing). Applicant's attorney advised that he was held up and would not be able to attend the hearing. Mr Rosi further testified that the Respondent's Human Relations Manager told the hearing that all parties to the hearing were notified timeously of the date, time and venue of the disciplinary hearing and that he had not received any communication from either the Applicant or his attorney indicating that they would not attend.

[22] It was Mr Rosi's evidence that in the interests of fairness, he decided to call the Applicant to find out if he was on his way and when he expected to arrive at his hearing. He testified that the Applicant told him that he would not be attending the hearing because his attorney had told him not to attend. Mr Rosi testified that he had advised the

Applicant to attend and that as an employee of the Respondent he was expected to appear at the hearing as he had been called to appear. He further testified that he advised the Applicant that the hearing could be held in his absence. The Applicant told him that he was aware of the possibility of the hearing proceeding in his absence but stood firm in his resolve not to appear at the hearing in the absence of his attorney.

[23] Mr Rosi testified that the hearing continued in the absence of the applicant and his attorney and the applicant was found guilty of two out of the three charges he faced and subsequently dismissed from the respondent's employ. He stated that no oral evidence was given even though all witnesses were present.

[24] When Mr Rosi was asked, in cross-examination why they could not accommodate the Applicant when he stated he would not attend the hearing his answer was that as an employee, the Applicant was expected to attend his disciplinary hearing. If he was unable to proceed because, for example, his representation was unavailable,

he would have stated so and the matter left to the chairman to decide on whether a new date was found or not.

[25] The Applicant submitted that it had been demonstrated in Court that he had not been negligent in the conduct of his duties on the night of 21st January 2013 when he allowed the private investigator access to hotel rooms to investigate. It was submitted, on his behalf that Applicant did not breach any confidentiality. It was submitted that he had acted on the instructions of Mr Rodriquez, a director of Respondent at that time, to allow the investigator to carry-out his investigations.

[26] It was the Applicant's submission that the respondent had failed to prove, on a balance of probabilities that the applicant had committed the offences for which he had been found guilty. Finally, the applicant submitted that even if the respondent had been able to show that applicant had committed the misconduct complained of, it was not reasonable, in the circumstances of the matter, to dismiss applicant, given that he had served respondent diligently over the years without any disciplinary record.

[27] On the procedural aspect, applicant's attorney submitted that the continuation of the disciplinary hearing in the applicant's absence amounted to a denial of his right to be heard prior to an adverse decision being taken against him. This, it was said, was more so because there had been a reasonable explanation for applicant's attorney's failure to attend the disciplinary hearings. Further that the respondent relied on the statements of Manqoba Matsebula and Mlungisi Shongwe and led no oral evidence before the disciplinary chairmen. On this basis, it was submitted, the disciplinary hearing was procedurally unfair.

[28] It was the applicant's further submission that the respondent had failed to afford applicant his right to appeal and that Mr Rosi's explanation before Court, that he was the last line of authority at Respondent was unacceptable given that he was fully aware that the applicant would be deprived of his right to appeal in the event he was dismissed but he insisted on sitting as co-chairman of the hearing.

[29] Applicant submitted that the respondent had failed to discharge the *onus* placed on it by **Section 42(2) (a) and (b) of the Employment**

Act 1980 to prove on a balance of probability that it was reasonable to terminate applicant's services in the circumstances of the case. Nor had the respondent shown that applicant's dismissal was in terms of **Section 36 of the Employment Act**.

[30] The Respondent's were that the Applicant's version of the events of 21st January 2013 was untenable; that by the Applicant's own admission, and the evidence of its two witnesses the Respondent had established that Applicant had, in fact, given access to its hotel rooms to the private investigator; that the Applicant had known, or ought to have known, that giving access to its rooms to an outsider would not be in the best interests of the Respondent as the hospitality industry values the safety, confidentiality and privacy of its patrons; that he was aware that in allowing access to the hotel rooms to an outsider he was committing a breach of the Respondent's rules and that he had failed to explain himself to both the Respondent and the Court; that substantively, the Respondent had been the author of his own misfortune and the Respondent had established that the Applicant's dismissal was substantively fair.

[31] The Respondent further submitted that by the evidence led in Court it had discharged the onus placed on it by **Section 42** of the **Employment Act** and that a case for the dismissal of the Applicant had been made out on a balance of probability. Further that the Applicant's dismissal falls squarely within the ambits of **Section 36 (a)** of the **Employment Act**.

[32] On the procedural aspect of the dismissal the respondent submitted that the applicant had been in wilful default of attending his disciplinary hearing and the chairman thereof had correctly found him guilty of the misconduct he had been accused of.

[33] In terms of our law and in terms of **Section 42 of the Employment Act 1980,** *"services of an employee shall not be considered as having been fairly terminated unless the employer proves –*

(a) that the reason for termination was one permitted by section 36;

(b) that, taking into account, all the circumstances of the case, it was reasonable to terminate the service of the employee."

[34] The respondent stated, in its submission that Applicant's dismissal falls squarely within the ambits of **section 36(a)** of the **Employment Act**. The cited section reads – "*It shall be fair for an employer to terminate the services of an employee for any of the following reasons –*

(a) because the conduct, or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him."

[35] The charges for which the applicant was found guilty at his disciplinary hearing are the following –

(a) *Gross negligence – in that you allowed a private investigator to unlawfully invade the employer's hotel and hotel rooms on 21st January 2013 without a Court order or any legal instrument sanctioning him to conduct private investigations in the hotel and such conduct caused unlawful invasion of the privacy of the employer and its guests.*

(b) Breach of confidentiality in that in allowing the private investigator to unlawfully invade the hotel and hotel rooms, the applicant failed

to protect the confidentiality of the employers property and guests yet he had a privacy duty to do so.

[36] The Applicant's evidence in relation to the charges he faced was that he was instructed by a director of the respondent to allow the private investigator access to the respondent's hotel rooms in pursuit of an investigation into the illegal use of rooms by a senior manager of the respondent to abuse female staff. His evidence was that he had spoken to the director on the private investigator's cellular phone to get confirmation of the instruction and that the director had himself come to the hotel on the particular night to ascertain how the private investigator had gone with his investigation. At paragraph 13.2.2 of his application the applicant states that –

"*The said private investigator was sent by one of the directors, Mr Pedro Rodriques to investigate one of the managers who was abusing hotel facilities by engaging in sexual activities with the female staff.*"

In its reply the respondent stated that -

"The applicant's narration of events is an afterthought as his own statement never referred to the alleged instruction of the directors, and was never stated at the initial hearing."

[37] The Applicant's explanation for his failure to disclose the alleged instruction from director Rodriquez was that he had been told that the director had asked to keep the matter secret. To a question from the court on why he did not reveal the instruction at the hearing when he faced the possibility of being dismissed, applicant stated that the director had told him he would take care of him and he had believed that he would not be dismissed.

[38] Ordinarily a security manager giving access to hotel rooms to a private investigator without just cause would be guilty of the charges applicant faced. More so since, as already indicated the hospitality industry values the confidentiality and privacy of its guests above all. However the applicant's evidence with regard to being instructed by a director to give the private investigator sent by said director, access to the Respondent's rooms stands to exonerate the applicant from the charges he faced. The Applicant's evidence of this instruction from

director Rodriquez is plausible, in our view. Where a director of a business suspects that a manager of his business is involved in deplorable activities that have the potential of bringing that business into disrepute, it is likely that he would want to have those suspicions either confirmed or dismissed by investigation.

[39] Applicant's evidence in this regard was not seriously challenged and the one person who could have done so conclusively, director Rodriquez, was not called to the stand to do so. There was no explanation why that was so given that as early as the filing of the application the allegation that he was responsible for the investigator was made. We come to the conclusion, on the evidence led before court that he was not guilty of either gross negligence or breaching confidentiality. We are also of the view that on the facts of this matter, even if he were to be said to be guilty the sanction of dismissal was too high. We say so for the reason that there was no evidence of any guest having been disturbed by the investigation. As applicant stated in evidence there were no complaints from guests who seemed not to have been aware of the investigation. Further it appears that the investigator targeted a particular room - room 39 - where he suspected the manager to be. In the circumstances and in view of the applicant's

record it would seem that the sanction was harsh. The Respondent submitted that the dismissal fell squarely within **Section 36(a) of the Employment Act 1980**. In terms of the said section applicant would have had to have a written warning prior to being dismissed. There was no evidence of a written warning and Applicant's evidence that he had never been subject to disciplinary action in all his years of employment with the respondent is uncontroverted. In these circumstances it would not have been reasonable to dismiss the Applicant.

[40] In view of the aforegoing the court comes to the conclusion that the Respondent has not been able to show that the dismissal of the applicant was for a reason set out in **Section 36 of the Employment Act** and that in all the circumstances of the matter it was reasonable to terminate his services. The Applicant's dismissal was therefore substantively unfair.

[41] On the procedural fairness complaint, we are of the view that the Applicant was in wilful default of appearance at his disciplinary hearing. This is so because he received timeous notice of the date, time and venue of the hearing but decided he would not appear when his

attorney was unable to appear because of another engagement. An employer is entitled to proceed with a hearing where an employee unreasonably refuses to attend. On the facts of this matter the employee's representative simply informed the initiator on the morning of the hearing that he was unavailable. The employer attempted to get the employee to attend even if it was to apply for a postponement on the basis of the unavailability of the representative but the employee elected to stay away. In our view it was not unreasonable for the employer to proceed with the hearing in the employee's absence. The hearing is primarily between employer and employee. The absence of a representative may give the employee a reason to ask for the hearing to be postponed but he is expected to be at the hearing unless there have been prior arrangements made. The matter is distinguishable from the case cited by the Applicant's attorney, **Councillor Mandla Dlamini, Manzini City Council v Musa Nxumalo Appeal Case No. 10/ 2002**. In that in that case the employee appeared in person and sought a postponement of the hearing based on cogent grounds. In this matter the Applicant literally refused to appear and no application for a postponement was made.

[42] The Applicant had worked for the respondent since 1985 before his dismissal in 2013. Although his claim to have been employed in 1985 was denied and the respondent stated he was employed in August 2008, neither of the parties led any evidence to establish the applicant's actual date of employment. The parties did not address the matter in submissions. In the absence of the written particulars that ought to be provided in terms of **section 22** of the **Employment Act** we find that applicant was employed in 1985.

[43] The applicant was unable to find alternative employment and has now reached the age of 64. He indicated that the dismissal had affected his family negatively. He sought reinstatement alternatively maximum compensation for unfair dismissal, notice pay additional notice and severance pay. At the age of 64 it appears to us that Applicants beyond retirement and reinstatement is therefore not possible.

[44] Taking into account the evidence led in court, the interests of justice, fairness and equity and the personal circumstances of the applicant we make the following order

(a) The Respondent is directed to pay the Applicant as follows:

(i) Notice Pay	- E 9 008.50
(ii) Additional notice Pay	- E 36 033.92
(iii) Severance Pay	- E 90 084.80
(iv) 8 Months Compensation	- E 72 064.00
TOTAL	**E 207 195.22**

The Members Agree.

Nsibande

S. NSIBANDE
JUDGE PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr M. Mathunjwa (Nzima & Associates)

For Respondent: Mr Mthethwa (CJ Littler & Co.)