IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 29/2020

HELD AT MBABANE
In the matter between:

SWAZILAND AIRLINK (PTY) LTD **Appellant**

and

NONHLANHLA SHONGWE N.O. **1st Respondent**

STAWU O.B.O. MALIZO SIKITI **2nd Respondent**

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC) **3rd Respondent**

Neutral Citation: *Swaziland Airlink vs Nonhlanhla Shongwe N.O. and Two Others* (29/2020) [2020] *SZSC* 26 (19/08/2020).

Coram: **R.J. CLOETE JA, J.P. ANNANDALE JA AND J.M. CURRIE AJA.**

Heard: 12th August, 2020.

Delivered: 19th August, 2020.

SUMMARY : *Labour Law – Appeal against an award by CMAC which was confirmed by the Court a quo – Procedural unfairness resulted in an unfair disciplinary enquiry – 2nd Respondent given 20 minutes to find a fellow employee to represent him – Once procedural unfairness found there is no need to proceed to deal with substantive issues – Appeal dismissed.*

JUDGMENT

CLOETE – JA

[1] The Appellant brought an application for the condonation of the late filing of its Heads of Argument and its Bundle of Authorities. The said application complying in all respects with the requirements of this Court, it was granted with no order as to costs.

[2] Mr. Maseko, on behalf of the 1st Respondent, attempted to bring an unacceptably belated application for similar condonation from the Bar. In keeping with the well documented attitude of this Court, no documents were accepted from the Bar and as such there were no Heads of Argument nor a Bundle of Authorities from 2nd Respondent before us. Despite that, Mr.

Maseko was in the interests of justice given the opportunity to address the Court in response to matters raised by the Appellant. I wish to again re-iterate that this Court takes a dim view of lawyers who do not remotely comply with the Rules and time limits prescribed therein. It is to be recorded that despite being told by the Court that the documents which he tried to hand in from the Bar would not be accepted by the Court, he nevertheless unsuccessfully attempted to file these documents with the Registrar of the Court at the end of the hearing.

[3] The Appellant is Swaziland Airlink (Pty) Ltd a company registered in Eswatini and carrying on the business of conveying passengers and cargo to and from Eswatini.

[4] The 1st Respondent is Nonhlanhla Shongwe N.O., an adult female employed by the Conciliation Mediation and Arbitration Commission ("CMAC") as a Commissioner.

[5] The 2nd Respondent is Malizo Sikiti, an adult male formerly employed by the Appellant.

[6] The 3rd Respondent is CMAC, a statutory body established in terms of the Industrial Relations Act 2000.

[7] The 2nd Respondent was employed by the Appellant as a Supervisor from June 1999 to August 2012.

[8] On 6 July 2012 the Appellant instituted disciplinary proceedings against the 2nd Respondent who was charged with three (3) counts namely:

> **"Count 1: Gross negligence in that you failed to perform your duties with proper care as required in that you did not follow the company's set procedures for the dispatch of flights by allowing SA 8015 on the 1st June 2012 and SA 8013 on the 8th June 2012 to dispatch without flight documents on board which in the process caused a delay on the next flights and therefore consequently brought the company's name into disrepute and exposed the company to heavy penalties.**

Count 2: **Gross negligence in that you failed to execute your duties in accordance with procedures and in the process caused flights SA 8991 on the 16th June and flight SA 8997 on the 17th June 2012 to be delayed by about 25 minutes, which delays culminated in passengers missing their connection at OR Tambo International Airport, an act that resulted in huge accommodation costs and consequently put the company's name into disrepute.**

Count 3: **Gross negligence in that on the 15th June 2012 you allowed passenger Motondo Jonathan to travel to Oslo with an invalid visa and in the process exposing Swaziland Airlink to heavy penalties and bringing the company's name into disrepute".**

The charge sheet appears to have been received by 2nd Respondent on the same day.

[9] On 9 July 2012, two (2) days before the disciplinary hearing, 2nd Respondent was confronted with and told to sign a document headed "Volume H Human

Resources Manual (Page 20 of the Record)". The salient features of that document are the following:

> **"I confirm that I have been advised of the following:**
>
> 1. **I am entitled to be assisted at the disciplinary enquiry by a fellow employee only. No outside Representative will be allowed.**
>
> 3. **I am entitled to have the opportunity to confer with my representative at reasonable times, <u>before</u>, during and after the enquiry.** (My underlining).

[10] At the hearing of the enquiry on 11 July 2012, it transpires that 2nd Respondent advised the Chairman of the enquiry, one Mphilisi Mtshali, that he seeks a postponement on the grounds that he was not given sufficient time to prepare for the hearing, that he wanted a person from the holding company (Reference to South African Airways at Page 21 of Record clearly means South African Airlink) and that he wanted to be provided with his job description before commencement of the hearing (Page 21 of Record).

[11] The 2nd Respondent had advised the Chairman that the charge sheet was given to him on Friday 6th and that he was not able to find anyone to assist him over the weekend as the employee of the same rank as him was on leave.

[12] The Prosecutor at the enquiry, one Sandile Chipunza, argued that in terms of the Human Resources Policy of the company, 48 hours notice was sufficient, and he further pointed out that Swaziland Airlink was a standalone company and that 2nd Respondent should thus get a local fellow employee to represent him and finally that all employees are given their job descriptions upon being employed (Pages 21 and 22 of Record).

[13] At Page 22 of the Record, the Minutes of the enquiry reflect the following statement by the said Chairman:

> **"Therefore the preliminary points are dismissed and the hearing is adjourned for <u>twenty (20) minutes</u> to allow the accused**

employee to seek representation from within the company." (My underlining).

[14] It is common cause that 2nd Respondent had to obtain the services of an employee junior to him to represent him. As stated by Maseko J. in his Judgment in the Court *a quo* at page 145 of the Record **"It is common cause that the colleague** (who the 2nd Respondent hastily had to engage) **was a spectator as she honestly could not defend someone senior to her in these proceedings."**

[15] The charges were then put to 2nd Respondent. At Pages 23 and 24 of the Record it reflects that 2nd Respondent pleaded not guilty to Counts 1 and 3 but guilty to Count 2.

[16] While in the bigger picture it does not affect the outcome of this appeal, it is necessary to point out that:

(1) At the CMAC Arbitration 2nd Respondent denied pleading guilty to Count 2.

(2) However in his appeal to the Managing Director of the Appellant dated 13 August 2012 (Page 84 of the Record) and after having received the minutes of the enquiry of 12 July 2012, he did not specifically deny that he had pleaded guilty to Count 2 but at Page 85 of the Record stated **"The sanction was harsher than the misconduct."**

[17] To return to the sequence, the finding of the enquiry of 12 July 2012 as set out on Page 43 of the Record was as follows and dated 1 August 2012:

RECOMMENDATION

For the reasons stated above it is justified for the employer to impose the relevant sanctions in terms of the Human Resource Manual. On the first charge, the accused employee is found guilty for the offence of negligence and the corresponding penalty thereto is a final written warning. On the second charge, the accused employee pleaded guilty to the charge as it stands and the sanction for the offence is a summary dismissal. Finally, on the third charge the accused employee is also found guilty of gross

negligence for failure to comply with the company's procedure when checking-in a certain passenger who was enroute to Oslo. As a result the employer incurred loss to its reputation and a possibility of a penalty which was not yet imposed when this hearing was convened and finalized. The corresponding penalty to this charge is also a dismissal, that is according to the Human Resources Manual.

At this stage I will refer the matter to management for appropriate action.

[18] On 10 August 2012 2nd Respondent received the formal Notice of Dismissal from Appellant as set out at Page 44 of the Record.

[19] Upon receipt thereof, 2nd Respondent duly appealed to the Managing Director of the Appellant on 13 August 2012.

[20] The Appeal Chairperson Nonhlanhla Mthobisi Dlamini dismissed the appeal as appears at Pages 45 to 49 of the Record.

[21] It is common cause that the matter was eventually referred to Arbitration by CMAC. After a full hearing with evidence led by both parties the 1st Respondent handed down the following award on 29 June 2015;

AWARD

130. The Applicant's dismissal was procedurally and substantively unfair.

131. The Respondent is hereby directed to pay the Applicant as follows:

131.1	**Notice pay**	**E 11,086.28**
131.2	**Additional notice pay**	**E 24,556.80**
131.3	**Severance pay**	**E 61,392.00**
131.4	**10 months compensation for the unfair dismissal**	**E110,862.80**
	Total	**E207,897.88**

132. The Respondent is further directed to pay the Applicant the said sum of E207,897.88 not later than the 31st July 2015.

[22] Not being satisfied with the award, the Appellant, on 11 August 2015, brought an application to the High Court in the following terms:

1. **Reviewing and/or correcting and/or setting aside the Arbitration Award issued by the 1st Respondent dated 29 June 2015 under CMAC Case SWMZ 682/2013;**

2. **Ordering and directing the 1st Respondent to dispatch and file the record of the arbitration within the time determined by the above Honourable Court;**

3. **Cost of suit in the event of opposition.**

4. **Further and/or alternative relief.**

[23] The Court *a quo*, per Maseko J. handed down its Judgment on 17 October 2019 in the following terms (Page 159 of the Record):

[76] Consequently I hereby hand down the following order:

1. **The Application to review and/or correct and/or set aside the Arbitration Award issued by the 1st Respondent dated the 29 June 2015 under CMAC Case SWMZ 682/2013 is hereby dismissed.**

2. **The said Arbitration Award issued by the 1st Respondent dated the 20 June 2015 under CMAC Case SWMZ 682/2013 is hereby confirmed.**

3. **The Applicant is to pay costs on the ordinary scale.**

[24] Appellant sought and on 15 May 2020 obtained an Order in the High Court in the following terms:

> **"The Appellant is hereby granted leave to appeal the Judgment of this Honourable Court delivered on the 17th of October 2019."**

[25] On 22 May 2020 the Appellant duly filed a Notice of Appeal setting out the following grounds of appeal:

GROUND 1

1.1 By dismissing the entire application on the finding of procedural unfairness relating to the denial or alleged denial of a right to representation to the 1st Respondent:

1.1.1 the grounds for review serving before the Honourable Court comprised of both substantive and procedural grounds and the Honourable Court *a quo* ought to have dealt with all the grounds.

GROUND 2

2.1 By finding that the dismissal of the 1st Respondent was procedurally unfair in that the 1st Respondent was denied a right to representation and or the Chairperson of the disciplinary hearing did not exercise his discretion judiciously in affording the 1st Respondent twenty minutes to secure representation.

GROUND 3

3.1 By finding that the only legal question to be decided in the matter was the procedural fairness of whether the Chairperson exercised his discretion judiciously when he afforded the 1st Respondent twenty minutes to secure representation;

3.1.1. the Honourable Court *a quo* ought to have also decided the other grounds of review especially relating to the substantive fairness of the dismissal.

GROUND 4

4.1 By finding that it was unnecessary to consider the aspect of substantive fairness or unfairness of the dismissal of the 1st Respondent;

4.1.1 the Honourable Court *a quo* ought to have decided all the grounds of review relating to procedural fairness and substantive fairness of the dismissal.

WHEREFORE, the Appellant prays that the appeal be allowed with costs.

[26] Mr. Simelane, on behalf of the Appellant, who had filed extensive Heads of Argument, in essence made the following points:

1. That the review proceedings in the Court *a quo* should have been dealt with on a two pronged basis, namely that the Court should have interrogated the procedural issues as well as the substantive issues and it had failed to do so.

2. That this constituted an error of law and ought to be set aside.

3. Referred us to the case of ***Swaziland Breweries vs C.R. Delport, Industrial Court of Appeal case 05/2012*** which will be dealt with below relating to a purported 3 prong enquiry.

4. Also referred us to ***NGWENYA GLASS (PTY) LTD VS PRESIDING JUDGE OF THE INDUSTRIAL COURT, HIGH COURT CASE 3206/2008*** which will also be dealt with below.

5. Referred us to the provisions of Sections 36 and 42 of the employment Act.

6. Asked the Court to uphold the Appeal.

[27] Mr. Maseko, given the right to address the Court despite being in breach of the Rules, basically re-iterated that the Court *a quo* had acted entirely properly in arriving at its Judgment. Once the Appellant had failed to cross the first hurdle of procedural unfairness that was the end of the matter.

[28] For the Record;

1. Section 36 of the Employment Act 5 of 1980 provides for the fair grounds of dismissal by an employer. With respect this section has no bearing on the matter at hand and I do not believe that it supports the argument of the Appellant and has nothing to do with procedural fairness.

2. Similarly, Section 42 of that Act under the heading **"Burden of Proof"** does not take the argument of Mr. Simelane any further as it specifically deals with the notion that any dismissal must be in terms of the Provisions of Section 36 and that there must be reasonable grounds to dismiss an employee. I do not see any provision in this section which furthers the argument that the substantive fairness of a dismissal is part of the two pronged process Mr. Simelane based his argument on.

[29] The case of **Ngwenya Glass** *supra*, with respect, also does not enhance or advance the argument of Mr. Simelane. That case seems to me to specifically deal with Section 42 of the Employment Act referred to above and does not specifically deal with what was clearly a procedural issue in the current matter.

[30] Similarly the **Swaziland Breweries** matter *supra* is not on point. The three pronged enquiry clearly related to the actual charges and dismissal and not the actual procedure and the relevant portion of that Judgment states:

"In his argument before us, Counsel for the Respondent Mr. Smith SC, whilst agreeing that the Court a quo had misdirected itself in finding that for every misconduct to be dismissible it has to be preceded by a written warning, submitted that that was not the end of the enquiry before us as the Employment Act contemplated a three pronged enquiry which, simply put, could be listed as follows:

(a) Was the employee <u>guilty of a dismissible misconduct</u>,

(b) When taking into account all the circumstances of the matter <u>was it fair and reasonable to dismiss him and</u>,

(c) **<u>Lastly, were there any factors mitigating in his favour and were they considered</u>."** (My underlining).

[31] With respect, it seems to me that in this Appeal, as was found by the Court *a quo*, there are simply two legs to the matter at hand. The first is the issue of whether the 2nd Respondent was afforded a judicially considered fair hearing at the disciplinary enquiry? The second leg is whether the Appellant abided by the provisions of Section 42 of the Employment Act in that could it be

said that the grounds on which 2nd Respondent was found guilty fell within the provisions of Section 36 of the Employment Act and that in all the circumstances it was fair and reasonable to dismiss the 2nd Respondent?

[32] As regards the first leg, the following appears from the Record at the commencement of the disciplinary hearing, the 2nd Respondent *inter alia* requested a postponement to enable him to obtain the services of a fellow employee of the same rank as himself. He states that he has tried to contact the fellow supervisor of the same rank but he was on leave and as such he wanted to get someone from the South African mother company to represent him.

[33] At page 23 of the Record and as set out in Para 13 *supra*, the finding of the Chairman is **"Therefore the preliminary points are dismissed and <u>the hearing is adjourned for twenty (20) minutes to allow the accused employee to seek representation from within the company</u>."**

(My underlining).

[34] The 2nd Respondent having been refused the right to obtain the services of an employee of his same rank, hastily has to appoint a person junior to him to "represent" him.

[35] Surely representation means that the person should have knowledge of the dispute, is given time to consider the matters at hand, is qualified to give sound advice and is able to be of assistance to the accused person! Can it be said that this is what happened in the instant matter? The answer has to be an emphatic no. As stated by the Court a quo at Page 145 of the Record and referred to at Para 14 *supra* **"It is common cause that the colleague was a spectator as she honestly could not defend someone senior to her in these proceedings. The time allocated for 2nd Respondent to organise his representation was too short in the circumstances. No matter what the situation may be or how strong the facts and merits against an accused employee may be, 20 minutes is too little for an accused to arrange for representation before any disciplinary proceedings."**

[36] I agree entirely with the comments of Maseko J. as above. But in addition one has to refer to what is clearly the watershed decision in the Industrial

Court of Eswatini being **NDODA H. SIMELANE VS NATIONAL MAIZE CORPORATION CASE NO.453/06** where Dunseith JP stated at Pages 1 – 2:

> **"1. An employee charged with misconduct is <u>entitled to a fair disciplinary hearing</u>."**
>
> **2. It has been the view of Labour Courts and Labour Jurists in South Africa for many years that one of the essential requirements of a <u>fair disciplinary hearing is that the employee be afforded the right to be represented at the hearing if he/she so wishes</u>."**

And further at Pages 7 – 8:

> **"21. By way of guidance, the Court indicates that the following considerations should be taken into account by the chairperson in deciding whether legal or other external representation is indispensable to ensuring a procedurally fair hearing:**

21.1 Whether a <u>fellow employee of equal status to the applicant is available to represent him</u>;

21.2 If not, whether representation <u>by a subordinate would be unreasonably degrading to the applicant and/or hamper him in the presentation of his defence</u>;

21.3 <u>Whether an employee of the organisation can satisfactorily represent the interests of the applicant in circumstances where the Chief Executive Officer is the complainant</u>;

21.4 In circumstances where external representation is appropriate, <u>whether it is reasonable to restrict the applicant's choice</u> to an employee from another local parastatal."

(My underlining).

[37] The Court *a quo* at 151 of the Record in turn states as follows relating to the award of the 1st Respondent:

"116. There is no indication from the Chairperson's ruling that he did take into account any of these considerations. The Applicant was a Supervisor and there was one other Supervisor who was of equal status to the Applicant, who unfortunately was on leave at the time. So there was no other staff member competent to represent him since the General Manager was the complainant.

117. There would have clearly been no prejudice to the employer if representation from SAA in particular was allowed, taking into account the employment status of the Applicant and the fact that the employer was being represented by the SAA's Human Resources Manager Mr. Chipunza, General Manager who was the complainant in the disciplinary hearing and Chairperson was an attorney. Since the option of securing a representative from SAA was available as indicated by the initiator the Chairperson should have considered it."

[38] The Court *a quo* also correctly refers to the provisions of the Constitution of Eswatini where Section 21(1) provides:

> **"[63] <u>The right to a fair hearing before any adjudicating authority is a constitutional right that is to be enjoyed by any person who is due to appear before any such adjudicatory authority. The refusal to afford any person this fundamental right amounts to a violation of Section 21</u> (1) of The Constitution of the Kingdom of Eswatini Act No.1 of 2005 which provides as follows:**
>
> > **21.(1) In the determination of civil rights and obligations or any criminal charge a person shall be <u>given a fair</u> and speedy public <u>hearing</u> within a reasonable time by an <u>independent and impartial</u> court or <u>adjudicating authority</u> established by law."** (My underlining).

[39] At Page 158 of the Record the following cases quoted by the 1st Respondent were repeated by the Court *a quo* and I fully identify with the *dictae*:

> **'124. The Labour Appeal Court held in HIGHVELD DISTRICT COUNCIL V CCMA & OTHERS [2002] 12 BLLR 1158 (LAC)** that**:**
>
> > **"When deciding whether a particular procedure was fair, <u>the tribunal judging the fairness must scrutinise the procedure actually followed. It must decide whether the procedure was fair</u>.**
>
> **125. The Constitutional Court of South Africa in SIDUMO v RUSTENBURG PLATINUM MINES LTD 2008 (2) BCLR 158 (CC) AT (75)** expressed the following**:**
>
> > **"….<u>the CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the Commissioner's sense of fairness must prevail and not the employer's point of view.</u>'"** (My underlining).

[40] Can it then be said with any conviction that the 2nd Respondent was given a procedurally fair hearing at the disciplinary enquiry? Again an emphatic no. Can it be said that the Chairperson considered the basic requirements as espoused in the **NDODA SIMELANE** matter? Another emphatic no. On the contrary the rules of natural justice were not followed and as such I agree with both the 1st Respondent and the Court *a quo* that 2nd Respondent was not afforded a procedurally fair hearing.

[41] That being the case the 1st leg of the matter has failed and the question then remains whether it is necessary or indeed proper to deal with the second leg.

[42] In my view, in this matter, once it has been established that the 2nd Respondent did not receive a fair hearing and that it was as such procedurally unfair that was the end of the matter. Just as in a litigation matter where for example a point of law is raised *in limine* and the matter would come to an abrupt end if the point of law *in limine* were to be upheld, so too in this matter, having failed to jump the first hurdle, the Appellant cannot expect to proceed to the second hurdle and the Court *a quo* was accordingly correct not to do so.

[43] Another perplexing aspect is why there appeared to have been indecent haste to try and convict the 2nd Respondent. The Appellant itself hardly brought the charges with any haste considering that the last purported offence was committed on 17 June 2012. There is no evidence that the 2nd Respondent was suspended and appears to have continued with his duties until 6 July 2012.

[44] In the end result I agree entirely with the decision of the Court *a quo* per Maseko J. at Page 159 of the Record, which bears repeating, where he states:

> **"[75] I have no doubt in my mind that this is the end of the matter. I find it unnecessary to consider the aspect of substantive fairness or unfairness, in these circumstances where the 2nd Respondent was denied the fundamental right of *audi alteram partem*. This was a fundamental denial of justice and ultimately I find no reviewable grounds on the Arbitration Award granted by the 1st Respondent."**

[45] As an aside it was pointed out to Mr. Simelane that this Court is not a Court of first instance and even if the Appellant had succeeded in the matter, which it has not, the issue of substantive unfairness relating to the Award of the 1st Respondent, confirmed by the Court *a quo*, could not have been aired in this Court as it had not been dealt with in the Court *a quo*, or at least in its Judgment.

[46] As regards costs and despite the laxity and failure of Counsel for 2nd Respondent in complying with the Rules of this Court, I nevertheless believe that the 2nd Respondent is entitled to costs on the ordinary scale, such costs to exclude any costs related to the preparation of the Heads of Argument and Bundle of Authorities by counsel for the 2nd Respondent, admission of which was refused by this Court.

[47] Therefore in the end result the Order of this Court is:

1. The Appeal is dismissed.

2. The 2nd Respondent is awarded costs on the ordinary scale, excluding the costs referred to in Para 46 of this Judgment.

R.J. CLOETE
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE
JUSTICE OF APPEAL

I agree

J.M. CURRIE
ACTING JUSTICE OF APPEAL

For the Appellants: HENWOOD & COMPANY

For the Respondent: T.R. MASEKO ATTORNEYS