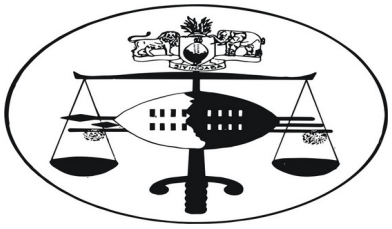

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 417/07

In the matter between:

MPENDULO HLATSHWAYO **Applicant**

And

PALFRIDGE LIMITED **Respondent**

Neutral citation: *Mpendulo Hlatshwayo v Pal fridge Limited (417/07 [2012]* SZIC 19 (JULY 13 2012**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Date of Submissions: **4 JULY 2012**

Judgment delivered: **13 JULY 2012**

Summary:
Applicant was dismissed by the Respondent after having been found guilty of the charge of industrial espionage. The Respondent is in the refrigerator manufacturing industry. There was however no evidence that the Applicant leaked any manufacturing secrets of the Respondent to its competitors. Instead, the evidence revealed that there was information leaked to the effect that the Respondent was not going to grant loans to pay school fees to some of its employees as it had been the practice because the employees had joined a trade union. There was no evidence how this information was detrimental to the refrigeration manufacturing business of the Respondent. The Court accordingly found that the dismissal of the Applicant was unfair.

JUDGMENT 13.07.12

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[1] This is an application for determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act No.1 of 2000 as amended.

[2] The Applicant is an adult Swazi male of Manzini and a former employee of the Respondent.

[3] The Respondent is Palfridge Limited, a company duly registered and incorporated in terms of the Company Laws of Swaziland, having its principal place of business at Matsapha, Manzini District.

[4] The Applicant claims that he was dismissed unfairly by the Respondent both substantively and procedurally. This was denied by the Respondent in its Replying papers.

[5] In his papers the Applicant averred that his termination by the Respondent was both substantively and procedurally unfair because:

> 5.1 He denies that he committed the alleged offence of industrial espionage.
>
> 5.2 The offence of industrial espionage does not exist in any of the Industrial or Labour laws of Swaziland.
>
> 5.3 The Applicant was denied the right to call witnesses in support of his case.

[6] The Respondent denied that the Applicant's dismissal was substantively and procedurally unfair. The Respondent stated in its Replying papers that the Applicant was fairly dismissed after a disciplinary hearing was conducted and the Applicant was found guilty of being a spy by leaking or revealing confidential information to outsiders which was detrimental to the Respondent.

[7] The dispute was reported by the Applicant to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute could not be resolved hence the Commission issued a certificate of unresolved dispute Annexure **"MH2"** of the Applicant's application.

[8] The Applicant thus instituted the present application for determination of the unresolved dispute and its seeking a relief in the following terms;

1. **Re-instatement; alternatively that the Respondent pays to the Applicant;**

2.	**Notice pay**	**E1,261.80**
3.	**Additional notice pay**	**E 582.36**
4.	**Severance pay**	**E1,455.92**
5.	**Leave pay**	**E 582.36**
6.	**Maximum Compensation**	**E15,141.60**
	TOTAL	**E19,024.04**
		=========

[9] There is no prayer for costs, and such was also not applied for before the court.

[10] **The Applicant's Evidence:-**

The Applicant told the court that he was employed by the Respondent in September 2003 as a Punching Machine Operator. He earned E600.00 per fortnight. He said there were problems at work involving the issue of shifts and transport. He said initially there were two shifts and that was changed to three shifts which meant that they had to be transported to their various places of residence as they stopped work at 11:00 p.m. He said during the two shift system there was no need for transport as they stopped work at 6:00 p.m. The Applicant said when he approached the employer to demand transport, he was perceived as a bad and troublesome person. He said he was thereafter accused of taking company information and giving it to Sonnyboy Matsenjwa, a co-worker.

[11] The Applicant said he did not know what that information was. The Applicant told the court that just days before the disciplinary hearing against him commenced, Peter Dubber found him at the reception and he asked him why is it that the Applicant was always in trouble. Peter Dubber went on to chair the disciplinary hearing of the Applicant.

[12] During the disciplinary hearing, the Applicant reminded Peter Dubber about the comments that he made against him at the reception. Peter Dubber however did not recuse himself from chairing the Applicant's

disciplinary hearing. The Applicant said there was no witness that was called to testify during the disciplinary hearing. He pleaded not guilty to the charge. He was however found guilty and dismissed. He said he was not given the opportunity to mitigate.

[13] The Applicant denied that he committed any acts of espionage at the Respondent's workplace. He said that following the issue of transport, the Factory Manager told him that from then onwards he was going to pay attention to him. The Applicant told the court that the decision to dismiss him was influenced by the grievance that the employees raised about the issue of transport. He told the court that he no longer wants to be re-instated.

[14] During cross examination, the Applicant re-iterated that he thinks he was charged because he raised the grievance relating to transport. He said he thinks he was singled out because he spoke better English language than his other colleagues and was known at work as a straight talker. He also said he once raised the issue of non submission of Provident Fund and he was instructed to go and work in the garden. The Applicant also told the court that he was one of the aggrieved employees as a result of being excluded from those who benefited from the Respondent's school fees loans.

[15] **The Respondent's Evidence:**

The Respondent's evidence was led by RW1, Adelaide Zondi and RW2 John Magagula. RW1 told the court that she was the Human Resources Officer when the Applicant was dismissed. She is no longer employed by the Respondent. She stopped working for the Respondent on 10.05.12. She said she was involved in the drafting of the charge sheet. She said the charge of espionage that the Applicant was facing meant divulging business secrets to competitors. She said the nature of the charge was explained to the Applicant during the disciplinary hearing.

[16] RW1 told the court that the Respondent found documents that contained things that the Respondent intended to do. These "things" involved the issue of advancing loans to workers for the payment of school fees. She said this issue was still being discussed by the Respondent when they saw it being mentioned in a letter addressed to the Respondent which had the letterheads of a union by the name of SPRAWU. She said this union was not recognized by the Respondent at that time. The question of the recognition of the union was still being addressed by the parties.

[17] RW1 told the court further that the Applicant at one point approached the Respondent and sought permission to conduct prayer sessions during the

lunch hour between 1:00 p.m. and 2:00 p.m. She said the Respondent thereafter discovered that, that became a platform for SPRAWU to recruit members. She said the Applicant did want to call Sonnyboy Matsenjwa as his witness, but that could not happen because Sonnyboy Matsenjwa was also facing a similar charge as the Applicant and had been dismissed at that time.

[18] During cross examination RW1 admitted that there was no witness led by the Respondent to prove the charge preferred against the Applicant. She denied that the Applicant was dismissed for being in the forefront in the formation of the union at the workplace. When asked if SPRAWU was a competitor to the Respondent, she said it was not but that the information revealed to SPRAWU was close to being detrimental as the issue of loans was still being discussed internally when it was leaked to outside people.

[19] The Respondent also led RW2, John Magagula. RW2 told the court that whilst the Respondent's management was still discussing the issue of school funds to be advanced to its employees, letters were found in the lockers of Lomathemba and Sonnyboy Matsenjwa containing the information on school fees advances to employees that was still being discussed by the Respondent. RW2 told the court that the Applicant was

linked to these letters by Sonnyboy Matsenjwa who confessed to him that they wrote the letters together.

[20] During cross examination RW2 was asked what business secrets did the Applicant leak from the Respondent's workplace. RW2 said there was none except that the Respondent no long trusted him.

[21] **Analysis of the Evidence and the Law Applicable:-**

In paragraph 5.4 of the Respondent's heads of argument it is stated that;

> "The Applicant is misdirecting the court when saying that leaking information to an unrecognized union was detrimental to the Respondent because the issue was still at administrative level and it was not necessary to expose such information. It is submitted that the Applicant conduct derogated trust between the employer and the employee."

[22] The Respondent's heads of argument were clearly not elegantly drafted. It seems that they were drafted in haste. From the heads of argument it became clear that the Applicant was dismissed for leaking of information to a union that was not yet recognized by the Respondent.

[23] The question that the court must answer therefore is whether this information was detrimental to the business of the Respondent so as to justify the dismissal of the Applicant. The second enquiry would be whether or not it was proved that this information was leaked by the Applicant.

[24] In its heads of argument the Respondent also assisted the court under paragraph seven by stating that the Applicant was fairly dismissed in accordance with **Section 36 (e) of the Employment Act as amended.**

[25] **Section 36 (e) of the Employment Act No5 of 1980 as amended** dealing with the fair reasons for the termination of an employee's services provides that it shall be fair to terminate the employee;

> **"because the employee has willfully revealed manufacturing secrets or matters of a confidential nature to another person which is or is likely to be detrimental to his employer."**

[26] There was no evidence before the court however, that the Applicant willfully revealed any manufacturing secrets of the Respondent.

[27] The evidence before the court revealed that there was a policy or practice at the Respondent's workplace in terms of which the employer granted loans to the employees specifically to pay school fees. It so happened that whilst the Respondent was engaged in recognition agreement negotiations with a union called SPRAWU, the Respondent decided in one of its meetings not to grant the loans to some of its employees, including the Applicant, because it suspected them of being in the forefront in assisting the union to be recognized at the Respondent's workplace.

[28] The information that some employees would not be eligible for the loans because of their alleged involvement with the union was leaked to the workers. The workers then wrote letters to the Respondent complaining about this and argued that it amounted to unfair discrimination. There were allegations that these letters were written using the letterheads of the union, SPRAWU. There was however no evidence to substantiate this before the court.

[29] One of the letters written and signed by three of the Respondent's employees was **Exhibit "B"** The letter appears as follows in part:-

"**Re: School fees Loans**

> Reference is made to the matter in subject.
>
> Please be advised that the undersigned having been delegated by the group of Palfridge employees who were denied the school fees loans offered by the company, allegedly because of their membership to SPRAWU.
>
> The Works Council Committee who was listing workers entitled to receive these loans exempted us, and stated that we have to resign from the union first. We are of view that this is not in the spirit of what the CEO assured us in the meeting of the 15th January 2007 that there will be no victimization of any sort with regards to our choices made on that day concerning our representatives.
>
> We are therefore requesting your good office to verify the source for the discrimination and forthwith address it in writing. Be reminded that if indeed such was an instruction from management it constitutes to serious prohibited employer practice.
>
> We are again requesting that we be given the loans as it been the case all these years, and specifically because some of our colleagues (sic) has been granted."

[30] If indeed there was information leaked that some employees have not been considered for school fees loans because of their association with the union, it is not clear how that information could be detrimental to the Respondent taking into account that an employee has the right to join a trade union of his or her choice. Union activities are lawful in Swaziland both in terms of the **Industrial Relations Act of 2000 as amended** and the **Constitution of Swaziland,** which is the supreme law of the land.

[31] No evidence was led before the court to show how information about school fees loans could be detrimental to the Respondent, a refrigerator manufacturing plant.

[32] The evidence further revealed that the practice of the Respondent of granting loans to pay school fees to its employees had been going on for a number of years. It was not clear then how it suddenly became a secret or a confidential matter in 2007.

[33] RW2 told the court that Sonnyboy Matsenjwa confessed to him that the Applicant was present when the letters were written. This was clearly inadmissible evidence against the Applicant. Sonnyboy Matsenjwa did not testify before the court or during the Applicant's disciplinary hearing.

[34] RW1 told the court that the charge of industrial espionage that the Applicant was facing meant that the Applicant divulged business secrets to competitors. The Respondent is involved in the business of manufacturing refrigerators. There was no evidence before the court that the Applicant divulged any information relating to the manufacturing of refrigerators to any competitor of the Respondent.

[35] There was also undisputed evidence before the court that the chairperson Peter Dubber had made unsavoury remarks to the Applicant when they met at the Respondent's reception areas before the holding of the disciplinary hearing. These remarks by Peter Dubber clearly disqualified him from presiding in the disciplinary hearing of the Applicant. Further, there was undisputed evidence that the Applicant after he was found guilty he was not afforded the opportunity to mitigate before the sanction was pronounced. This was yet another irregularity in the proceedings.

[36] An accused employee is entitled to a fair disciplinary process. The failure to afford the Applicant the opportunity to mitigate violated this right of the Applicant to a fair disciplinary procedure.

[37] It was argued on behalf of the Respondent that if an employer has a mistrust on a certain employee as the result of certain conduct of the employee, and can show that such mistrust is counter – productive to his commercial activities or the public interest, the employer would be entitled to terminate the employment relationship. The Respondent's attorney cited the cases of **Moahlodi v. East Rand Gold & Uranium Co. Ltd (1988) 9 ILJ 597 (IC) at 6011** and **Electrical & Allied Workers Trade Union V. The Production Casting Co. (Pty) Ltd (1988) 9 ILJ 702 (IC) at 708** in support of his argument.

[38] The present case is however distinguishable from the above cited cases. In the present case there was no evidence that showed that the Applicant's behaviour at the Respondent's workplace was counter productive to the Respondent's commercial activities or the public interest.

[39] The Respondent therefore failed to prove on a balance of probabilities that the reason for the termination of the applicant was one permitted by **Section 36 of the Employment Act.** The Respondent has also failed to prove on a balance of probabilities that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant. (See: **Section 42 of the Employment Act).**

[40] Taking into account all the foregoing, the court will come to the conclusion that the dismissal of the Applicant was substantively and procedurally unfair.

[41] **Relief:-**

The Applicant had no disciplinary record at the Respondent's place. He told the court that he supports his mother and his brother. He managed to secure another employment opportunity after his dismissal by the Respondent. He also told the court that he no longer wants to be re-instated

to his previous employment. From the evidence before the court it was clear that the Applicant was dismissed because he was an outspoken employee and was active in the bringing about of the recognition of the trade union at the Respondent's workplace. Taking into account all these factors the court will make an order that the Respondent pays to the Applicant, within fourteen days, the following amounts;

1.	**Notice pay**	**E1,261.80**
2.	**Additional notice pay**	**E 582.36**
3.	**Severance pay**	**E1,455.92**
4.	**Leave pay**	**E 582.36**
5.	**Maximum Compensation**	**E15,141.60**
	TOTAL	**E19,024.04**

[42] There was no prayer for costs, there will accordingly be no order as to costs.

[43] The members agree.

N. NKONYANE J

For the Applicant : Mr. M. N. Manana
(B. S. Dlamini & Associates)

For the Respondent : Mr. K. Magagula
(Magagula Attorneys)