



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 481/2006

In the matter between:

DAN MAVUSO

Applicant

And

A.D. ENTERPRISES (PTY) LTD

Respondent

Neutral citation: Dan Mavuso and Another v A.D. Enterprises (Pty) Ltd [2019] *SZIC 108* (12 November 2019)

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

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

Date Heard: 29 August 2019

Date Delivered: 12 November 2019

JUDGMENT

- [1] There are two Applicants in this matter. They are both Swazi males of Manzini in the District of Manzini, in the kingdom of Eswatini. They are both former employees of the Respondent. The 1st Applicant is Dan Mavuso and the 2nd Applicant is Mphiwa Magagula.
- [2] The Respondent is A. D. Enterprises, a company duly registered and incorporated in terms of the company laws of Eswatini and operating its business at the Matsapha Industrial Sites, Matsapha, district of Manzini.
- [3] 1st Applicant was employed by the Respondent as a heavy-duty driver on 1st December 1989, while 2nd Applicant was employed on the 15th December 2001 as a truck assistant. They were both dismissed on 27th April 2004 following a disciplinary hearing. At dismissal 1st Applicant earned E2576. 12 (Two Thousand Five Hundred and Twenty-Six Emalangenani Twelve Cents) per month while 2nd Applicant earned E1075.14 (One Thousand and Seventy-Five Emalangenani Fourteen Cents). They were in the continuous employment of the Respondent until their dismissal on 27th April 2004.
- [4] In their application, the Applicants stated that they were jointly charged with the theft of 158.4kg of Tinkhukhu Chicken /10 cases of Tinkhukhu Chicken, taken through a disciplinary enquiry, and were subsequently found guilty of the theft and

dismissed. They deny stealing the 10 cases of chicken and allege that their dismissal was unfair. They complained that the employer was selective in disciplining them because it failed to discipline a receiving clerk who was also charged simultaneously with the Applicants. They alleged that they were refused a proper hearing in that their appeal was a sham meant only to comply with internal process whereas the result was a foregone conclusion. It was their submission, on the papers, that their dismissal was unfair both substantively and procedurally and further unreasonable because their personal circumstances and mitigating factors were overlooked and not considered by the disciplinary tribunal.

[5] The Applicants are both reinstatement with arrear wages. Alternatively, they both seek payment of terminal benefits, outstanding leave pay (12 days) and maximum compensation for unfair dismissal. 1st Applicant's total claim amounts to E 30 913.44 (Thirty Thousand Nine Hundred and Thirteen Emalangeni Forty-Four Cents) and 2nd Applicant's total claim amounts to E12 901.68 (Twelve Thousand Nine Hundred and One Emalangeni Sixty-Eight Cents).

[6] The Respondent denied that Applicants' dismissal was procedurally and substantively unfair and averred that the Applicants were dismissed after a fair hearing and appeal process and that such dismissals were fair and reasonable in the circumstances. The Respondent further avers that both Applicants' personal circumstances and mitigating factors were considered but that because their conduct

had irrevocably broken down the trust that the Respondent had in the Applicants, dismissal was a reasonable sanction.

[7] Evidence led before Court was that the Respondent deals in perishable goods which it delivers to its clients around the country. These include eggs, chicken, milk and other perishable products. It was part 1st Applicant's duties as a truck driver to deliver these goods to the Respondent's clients. On a typical day, he was expected to wash his vehicle, oversee the loading of goods onto his truck, so as to ensure that the right goods were loaded for purposes of delivery and then ensure that deliveries were properly executed i.e. the right goods were delivered to the right client. Should the goods to be delivered be damaged it was 1st Applicant's duty to report this by appending his signature on a copy of the delivery note against the damaged goods. Further he was to check and the sign for stock that was being returned by a client on the copy of the invoice he was expected to return to his employer.

The 1st Applicant explained that when goods were returned by a customer, he and the customer would sign the invoice to acknowledge the returned goods. On return to the company premises these goods would be handed in by the truck assistant to the stock controller who would confirm, physically, that the goods were returned and issue a credit note which would be attached to the copy of the invoice and taken to security to stamp and then handed over to the Manager while the returned goods are returned to the Storeroom.

[8] It is common cause that the Applicant's troubles arose out of an order that was partially returned by the Psychiatric Centre in Manzini on 5th April 2004. It is common cause that the Psychiatric Centre returned 10 boxes of chicken from an initial order of 15 boxes. There is no dispute that the 1st Applicant correctly signed for the returned chickens on the appropriate document (copy of invoice) at the Psychiatric Centre and that these returned chickens were loaded into the truck. That is as far as the parties agree on what happened to the returned chicken pieces.

[9] It was the Applicants' version that the chicken pieces were returned to the Respondent, and accounted for and returned to the stock controller as usual. The 1st Applicant stated in chief that; after loading the chickens into the truck, he and his assistants left the Psychiatric Centre with the chickens and an invoice less box of 15 dozen eggs. They went into town where he dropped of the assistants at Shoprite. This was because it was now after their knockoff time of 4pm. He was then meant to go back to work but took the company vehicle to Sacro and later to Ngwane Park on a frolic of his own before going back to the company premises in Matsapha.

[10] It was his evidence that upon returning to the company premises and parking his vehicle, he offloaded the box of eggs with the help of security and had them loaded into another vehicle. He testified that the 10 boxes of chicken were left in the truck as it was a refrigerated truck and would be plugged in at night to store all returned perishables that required refrigeration. In other words, if there were goods that were returned by either himself or by other truck drivers after hours, that needed to

be refrigerated his truck would be plugged in and used as a refrigerator and all drivers returning with perishables would load them onto his truck for the night. The eggs were removed because, it was said they would not survive the night in the refrigerated truck as the cold would cause them to crack. He testified that he had told the security guard on duty to lock the truck once all the trucks had returned and had put their returned goods in the truck, if necessary.

[11] It was the 1st Applicant testimony that the next morning, the assistant driver, Mphiwa Magagula, unloaded the 10 boxes of chickens from the truck and returned them to the company. He testified that Mphiwa Magagula told him that the chickens were returned to Scott Dlamini who wrote a credit note acknowledging the return of the chickens. According to the 1st Applicant Scott Dlamini was the Stock Controller and was responsible for all stock coming in or out of the Respondent's premises.

[12] According to the evidence of the 2nd Respondent, the Stock Controller, was responsible for taking in returned stock. He would physically check the stock to see if it corresponded with what was written on the invoice and prepare and sign a credit note which would then be stamped by the security, upon being shown the returned goods. The assistant driver would then take the credit note to the Manager. The 1st Applicant could not confirm that the returned chickens went through this process because it was the 2nd Applicant, and not himself, that took in the returned chicken. He did say, however that 2nd Applicant told him that a credit note had

issued upon the chicken being returned to the Stock Controller, Scott Dlamini. He further testified that Scott Dlamini had confirmed to him that he had issued a credit note in respect of the returned box of chicken.

[13] The 2nd Applicant, in his evidence, confirmed that he had been dropped off in Manzini by the 1st Applicant on the 5th April 2004 after they had completed their delivery rounds and at the end of the work day. He confirmed that the Psychiatric Centre had returned 10 cases of chicken and that the said cases had been loaded into the truck. He further confirmed that the 10 cases were returned to the Respondent's premises by 1st Applicant. He further testified that on the following day, 6th April 2004, he approached the 1st Applicant's vehicle to offload the chicken. He was assisted by one Henry Somfana Simelane who worked as a Security Officer. After offloading the boxes of chicken he then went to another truck (SD 913 GX) to retrieve the 15 dozen eggs. His evidence was that he put the eggs on top of the chicken, and pushed the trolley to Scott Dlamini who was responsible for accepting returned stock. Scott Dlamini counted the chicken boxes then weighed them and prepared a credit note confirming the return of the said chicken. He further gave evidence that Scott Dlamini showed the Security Officer the cases of chicken and the 15 dozen eggs and that the Security Officer then stamped the credit note. 2nd Applicant then took the credit note to Mr Aaron Dlamini, the Manager. It was the 2nd Respondent's evidence that on the credit note it was indicated that ten (10) cases of chickens weighing 158 kg and 15 dozen eggs large were being returned. He stated that the credit note was stamped and signed by the Security Officer in his

presence. The credit note was attached to the relevant invoice and given to Aaron Dlamini.

[14] The Respondent's defence to the claim is contained in paragraph 4 of its Reply, where the Respondent states that the Applicants were jointly charged with the theft of 10 cases of chickens given a fair hearing and on the recommendation of the disciplinary tribunal and in view of the overwhelming and incriminating evidence adduced during the hearing which they failed to rebut, were fairly dismissed. The Respondent further states that the Applicants' personal circumstances were considered but their misconduct was found to have irrevocably broken down the trust Respondent had in them such that they had to be dismissed.

[15] In cross-examination of the Applicants it seemed to be suggested that the Applicants did not return the 10 cases of chicken to the Respondent's premises. It was put to the 1st Applicant that the truck he was driving had not been locked that night (5th April) because there was nothing in it. It was suggested that there was the one truck where the 15 dozen eggs were stored (SD 913AS) and another (SD 003 BN) which had five (5) boxes of hake plus 4 x 5 litres of Aquila water and that 1st Applicant's truck was empty. 1st Applicant denied all this and stated that although there were other refrigerated trucks, his also used electricity so it was usually the one plugged in to work as a fridge to store all returns that needed refrigeration. He denied that the truck was not locked and stated that the boxes of hake which had returned by another driver had been stored overnight in his truck.

[16] It was also put to the 2nd Applicant that the 1st Applicant's trucks had not been locked overnight because it had nothing inside. 2nd Applicant denied this and stated that in that truck were the 10 cases of chicken and some boxes of hake which had been kept overnight, having returned with one Norman Dlamini.

[17] The Respondent, in its cross-examination of 2nd Applicant seemed to acknowledge that Scott Dlamini, its Stock Controller had issued a credit note in respect of the 10 cases of returned chicken. It was suggested that Henry Somfana Simelane, the Security on duty at that time had refused to stamp the credit note because he had not seen the 10 cases of chicken. A copy of the purported credit note was shown to 2nd Applicant, who denied that it was the copy of the credit note he received from Scott Dlamini and handed over to Aaron Dlamini on 6th April 2004. He insisted that the one he had handed over to Aaron Dlamini was written '*15 Dozen Eggs, 10 cases Tinkhukhu Chicken*' and had the security stamp. The one shown to him in Court had no security stamp and only had the '*10 cases chicken*' written on it. He further denied that the copy shown to him was the one signed by the Stock Controller, stating in re-examination that the signature was different from the one he had seen over three (3) years of working with Scott Dlamini.

[18] It was suggested to him that he had taken advantage of Scott Dlamini's absence from his desk when he (the 2nd Applicant) had brought in the 15 dozen eggs, by simply telling Scott Dlamini that he had brought in 10 cases of chicken with the 15 dozen eggs and that Scott Dlamini had issued and signed the credit note without

having seen the 10 cases of chicken. The 2nd applicant denied this and insisted that company procedure would have prevented Scott Dlamini from issuing the credit note without having actually seen the 10 cases of chicken.

[19] The Respondent led one witness only, Henry Somfana Simelane, who had been on duty on 5th and 6th April 2004 as a security guard employed by a private security firm and posted at the Respondent's premises in Matsapha. His evidence was that he had been at work when 1st Applicant returned to the Respondent's premises in the late afternoon of the 5th April. While the witness was stationed at the gate and did not attend to the 1st Applicant's returning truck he was able to see his colleague, Sidwell Lukhele, assist the driver remove 15 dozen eggs from his truck. He testified that the 1st Applicant left after the eggs had been removed from the vehicle. It was his evidence that he was on duty in the morning on the 6th April at 6am. He was responsible for unlocking the trucks. He testified that the 1st applicant's truck was not locked because it did not have anything inside. He had therefore not unlocked the truck on that particular day. In cross-examination, however, he admitted that there had been some fish that had been off loaded from the 1st Applicant's truck on the morning of 6th April 2004. This would mean that most likely the truck had been locked. He insisted that there had been no cases of chicken offloaded from the truck.

When shown the copy of the credit note the witness professed to remember the note as the one issued by the Stock Controller and further confirmed the Stock Controller's signature. He said he recognised the signature following that he had

worked with Scott Dlamini for a period of four (4) years and had come to know his signature. He denied that he had seen the 10 cases of chicken and denied having signed and stamped a credit note as alleged by the 2nd Applicant. He was adamant that he had only signed and stamped a credit note acknowledging the return of 15 dozen eggs that the 2nd applicant had brought to him. He had not signed one regarding the 10 boxes of chicken because he had not seen the boxes. He testified that during the day, on the 6th April; Mr. Aaron Dlamini the Manager, had asked him why the credit note in respect of the 10 boxes of chicken had not been signed and stamped and that he had told Mr. Dlamini that he did not sign or stamp the credit not because he had not seen the boxes of chicken. He had testified at the disciplinary hearing of the two Applicants.

[20] At the Applicants' disciplinary hearing Scott Dlamini did not testify either on behalf of the company or the Applicants. The evidence led there was similar to the evidence led in Court save that a certain Ntokozo Mavuso testified that he had seen boxes of chicken in 1st Applicant's truck when he was offloading returned stock from that truck. He stated that he didn't know how many boxes of chicken were there but that he had certainly seen boxes of chicken in the vehicle. He did not give evidence in Court nor did Scott Dlamini. The Court was advised that Ntokozo Mavuso, Scott Dlamini and Sidwell Dlamini had all passed away while this matter was awaiting trial.

[21] In terms of **Section 42 (2)** of the **Employment Act No.5 of 1980**, the employer is required to show that the services of an employee have been terminated for a reason permitted by **Section 36 of the Act** and that taking into account all the circumstances of the case it was reasonable to terminate the services of the employee.

[22] Having regard to the evidence led in Court, we are unable to say that the Respondent has proved on a balance of probability, that the applicants committed the misconduct complained of. It boggles the mind why Scott Dlamini, the Respondent's credit controller would sign a credit note for goods not returned, much against company policy. It is also strange that he was not called at the disciplinary enquiry to confirm that the goods were brought in in his absence. He was responsible for the returned stock and would have clarified under what circumstances he issued the credit note. We find that the Applicant's evidence was consistent and that their behaviour, in returning the 15 dozen eggs that had no invoice was inconsistent with that of dishonest employees – it would have been easier not to return the eggs because they had no paper trail. We find it strange that Henry Simelane did not immediately report or query the issuance of the credit note in the absence of the 10 cases of chickens having testified that he refused to sign the credit note because he did not see the chickens. He had to wait until the manager asked him about the unsigned note later on in the day. Consequently, we come to the conclusion that it has not been proved that the Applicants stole the 10 boxes of chicken as alleged. The dismissal of the applicants is in breach of **Section 36 of the Employment Act of 1980** and is therefore unfair.

[23] The Applicants suffered financial loss following their dismissal. 1st Applicant testified that he remained unemployed until 2014 when he found permanent employment. Goods that he had purchased on hire-purchase were repossessed and he had to borrow money to pay school fees for his children. He had sought employment but could only find piece jobs from time to time. He initially sought reinstatement but he no longer sought same. It is common cause that 1st Applicant earned E2576.12 per month and that he claimed terminal benefits as follows:

23.1 Notice Pay	E 2576.12
23.2 Additional Notice	E 5152.23
23.3 Severance allowance	E 12880.40
23.4 Maximum compensation for unfair Dismissal	E30 913.44
23.5 twelve day's leave	E 1188.96

[24] The 2nd applicant testified that despite attempts to find work he remained unemployed and had not been employed since his dismissal by the respondent. He testified that he had found work but that had lasted for six months. He testified further that his wife left him as a result of his being unemployed and his children dropped out of school as he was unable to pay school; fees. He sought reinstatement alternatively the following terminal benefits

24.1 Notice Pay	E 1 075.14
24.2 Additional Notice Pay	E 165.40

24.3 Severance Allowance	E	413.50
24.4 Compensation for unfair dismissal	E	12 901.68
24.5 Leave pay (12 days)	E	496.20

We find that the circumstances of the termination of the 2nd Applicant's employment involving dishonestly are such that continued employment would be intolerable. In the circumstances the court is unable to order that he be reinstated.

[25] The claim for leave for both applicants were not challenged by the Respondent. The applicants' evidence that they were both owed twelve days leave was not challenged in cross-examination nor in the respondent's reply and thus will stand.

[26] There was also an issue with regard to severance pay, it being alleged that there was no specific claim for same in the certificate of unresolved dispute. In terms of **Section 34 of the Employment Act 1980** an employer is obligated to pay severance allowance to an employee, if it is found that the employment contract was terminated contrary to **Section 36 of the Act**. Having made that finding, it follows that the respondent will be liable to pay severance allowance for both applicants.

[27] Taking into account the circumstances of the matter the court orders that the Respondent pays the Applicants as follows:

DAN MAVUSO

1. Notice Pay	E	2 579.12
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2. Additional Notice Pay	E	5 152.23
3. Severance Allowance	E	12 880.50
4. Maximum compensation for unfair Dismissal	E	30 913.44
5. Leave pay (12 days)	E	1 188.96
TOTAL		<u>E 52 711.15</u>

MPHIWA MAGAGULA

1. Notice Pay	E	1 075.14
2. Additional Notice Pay	E	165.40
3. Severance Allowance	E	413.50
4. Maximum compensation for unfair dismissal	E	12 901.68
5. Leave pay (12 days)	E	496.20
TOTAL		<u>E 15 051.92</u>

The Respondents is also directed to pay the costs of this application.

The Members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicants: Mr. R. Ndlangamandla

For Respondent: Mr M. H. Mdluli Attorneys

