

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE

NO: 107/89

In the matter between;

ADELAIDE MABUZA Applicant

VS BARCLAYS BANK OF SWAZILAND (LTD) Respondent

C O R A M:

J.A. HASSANALI President

MR MOTSA for Applicant

MR BIGHAM for Respondent

MR V DLAMINI & MR MATSEBULA Assessors

AWARD

(Delivered 26th April, 1990)

Hassanali, P.

In this application the Applicant is claiming from the Respondent Bank the following sums for her termination –

1 month's salary in lieu of Notice 736.75

6 months compensation 4420.50 5157.25

I wish to briefly outline the events which ultimately led to her termination.

The Bank employed the applicant on 27/2/89 as a ledger clerk at its Manzini Branch on a starting annual salary of E7806.00 and placed her on probation for a period of 6 months (Ex.A). This was done presumably in terms of the Collective Agreement (Ex.C) and also in terms of Clause 2 of the Articles of Agreement (Ex.D). On a certain day one Mrs Potgeiter walked into the Bank and saw applicant working. She asked the Bank Manager as to how he came to employ her when she had been sacked by her company, Jomar Investments Ltd., for dishonesty. Pursuant to these remarks, the Bank sent out

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to her a set of questionnaires which was later returned duly signed with the necessary answers (Ex.F). On the contents of this questionnaire, the Bank on 2/8/89 terminated

the services of the applicant (Ex.B).

I shall now refer to the grounds on which the applicant was dismissed from the Company called Jomar Investments Ltd.

Mr. Potgeiter in his evidence has stated that the applicant was employed in the Accounts Department of the Company. On a certain day he sent her to Metro Cash to purchase goods for the Company and for that purpose a signed cheque was given to her with instructions that she should insert the amount for the goods purchased. Having bought the said goods, she also made some purchases for herself and entered the total amount of both purchases in the cheque. When this was later discovered, the Company proceeded to deduct her amount from her salary in monthly instalments. Mr. Potgeiter could not remember any of the details on this matter, but said that this information was available in the Company books. The applicant however strongly denied this allegation. She said that she had nothing to do with the purchases and was never sent to Metro Cash to buy any goods. The company never deducted any amount from her salary. Furthermore she said that the person who did the purchases at Metro Cash was one Miss Reid. In view of her denial, I would have expected the Respondent to have produced the books of the Company to support the evidence of Mr Potgeiter but for some reasons or other, this was not done.

Mr. Potgeiter also said that on another occasion, one of his employees, a Mozambican, with the connivance of the applicant stole a cheque leaf from the Company's cheque book, forged the signatures of the directors and withdrew a sum of E15000/= from the Bank. This person was later charged in the Magistrates Court. According to Mr. Potgeiter the applicant had made a statement to Inspector Sithole admitting her involvement in the said fraud.

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This allegation too was strongly denied by the applicant. She admitted giving the cheque book to the Mozambican since he too worked for the Company but denied that she had in any way helped him to withdraw the money. She however said that despite this incident she continued to work for the Company for about a year, before she was retrenched. In view of her denial, the Bank should have called Inspector Sithole whose evidence might have helped the Court to arrive at a just decision on this matter.

Anyway it is common cause that the applicant was placed on probation for a period of 6 months. What is probation? According to Arye Globerson it means "A fixed and limited period of time for which an Organization employs a new employee in order to assess his aptitudes, abilities and characteristics and the amount of interest he shows in his job so as to enable employer and employee alike to make a final decision on whether he is suitable and whether there is any mutual interest in his permanent employment" (Duration and Extension of Probationary Employment - A Re Examination in (1969) Vol.11 The Journal of Ind. Rel. 54 at 56).

Therefore taking the above into consideration it seems to me that a person's probation could be terminated only if that person fails to reach the expected standard

in his work performance and not for any other reasons which have no relevance to her work. Mr. Thwala, the Personnel Manager testified that the applicant's work performance was within the acceptable limit and as such she would have been confirmed in her appointment at the end of her probation. In the circumstances the termination of the applicant's probationary period for reasons which had no relevance to her work was wrong and unjust.

I turn to the next question as to whether the Bank was justified in placing the applicant on probation for a period of 6 months.

Mr Motsa representing the applicant argued that since she was only

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a ledger clerk and performed work of a non-confidential nature, her period of probation should have been only for 3 months as envisaged under Sec. 32 (2) of the Employment Act and at the end of this period her appointment should have been either confirmed or her services terminated. As this did not materialise at the end of the 3rd month, she automatically became permanent. Therefore he argued, that her services could have been terminated only under Sec. 36 of the said Act. Since this had not been done, her termination was unfair and wherefore she was entitled to one month's salary in lieu of Notice and maximum compensation.

Mr. Bigham representing the Respondent took up the position that the applicant was placed on probation for a period of 6 months in terms of the Collective Agreement, Articles of Employment and also because of the confidential nature of the work she performed, and therefore the Respondent was perfectly justified in terminating her services on account of the report received from Mrs. Potgeiter.

I wish to refer to Sec. 32 of the Employment Act which reads as follows –

- "(1) During any period of probationary employment as stipulated either in the form to be given to an employee under Sec. 22 or in a Collective Agreement governing his terms and conditions of employment, either party may terminate the contract of employment between them without notice.
- (2) No probationary period shall except in the case of employees engaged on Supervisory, technical or confidential work, extend beyond three months.
- (3) In the case of employees engaged on supervisory, technical or confidential work, the probation period shall be fixed in writing, between the employer and employee at the time of engagement. "

The Respondent took up the point that the Applicant was placed on probation for 6 months because –

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- (a) she performed work of a confidential nature
(b) she was governed by the Collective Agreement and Articles of Employment.

The question is, did she perform work of confidential nature? The applicant was a

ledger clerk and maintained accounts relating to some of the customers. Mr. Thwala in his evidence did not enumerate on the kind of work she performed in order to classify her as an employee who did work of a confidential nature. In my view an employee could be said to be doing work of a confidential nature, if such, an employee had personal access to other confidential information substantially affecting the conduct of the business of the employer. In this regard I wish to refer to Kenya Industrial Court by S. Cockar at page 137, which reads as follows –

"A person who is engaged in work of a confidential nature e.g. who has access to confidential information which could be of use to an Union, or who is directly training for such a position.

The following list is indicative of the type of job which would be covered by this definition –

Staff dealing with Senior Management (it should be noted that this does not include staff preparing salaries of unionisable employees), staff employed in personnel department dealing with and having direct access to personnel matters. Personal Secretaries to Senior Management."

There is no evidence that the applicant had personal access to confidential information substantially affecting the conduct of the Bank. There is also nothing to show that she dealt with information relating to Senior Management, nor did she have access to personnel matters. Therefore in my view the applicant could not be classified as one who dealt with confidential

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work. In the circumstances I reject the Respondent's contention that the applicant did work of a confidential nature.

The next question is whether Article I Part II of the Collective Agreement or Clause 2 of the Articles of Employment, both relating to probation would apply to the applicant. Mr. Bigham argued that both documents should be accepted in preference to Sec. 32 of the Employment Act. I am afraid I cannot hold with him in view of Sec. 3 of the said Act which is as follows –

"Except as expressly provided by this Act any arrangement by any person to contract out of its provisions shall be null and void."

Having perused the documents Exs. C & D, I find that both these documents are not in conformity with Sec. 32 of the Act. Therefore the provisions relating to probation in the Collective Agreement and articles of Employment are null and void. Consequently Sec. 32(2) of the said Act would then apply to the applicant.

I would now take up the point whether the Respondent was justified in terminating the services of the Applicant.

I have already held that the probationary period for the applicant should have been

only 3 months as contemplated under Sec. 32(2) of the act and therefore this period would have expired on 27/5/89. Since her probationary period was not terminated on the expiry of the said date, she in my view automatically became permanent. Consequently when the Respondent terminated the applicant's services on 1/8/89, she was on the permanent staff of the Bank and as such her services could have been terminated only under Sec. 36 of the Act. Since this was not done, I consider her termination unfair.

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I now turn to the question of Compensation.

The Applicant holds a Diploma in Accounting and Business Studies from the University of Swaziland. She is 26 years old and unmarried. According to her, she has been unemployed from the time she left the Bank.

Therefore taking the above into consideration together with the circumstances under which she came to be dismissed, I am of the view, that an order for one month's salary in lieu of Notice together with full compensation would be just and equitable.

I accordingly order the Respondent Bank to pay the applicant the following –

1 month's salary in lieu of Notice E.736.75

6 months compensation 4420.50

E5157.25

This Order is entered as an Award of this Court. My Assessors agree with my decision.

J.A. HASSANALI, PRESIDENT