

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 288/2002

In the matter between:

NDUMISO NHLENGETFWA

APPLICANT

and

STANDARD BANK SWAZILAND LIMITED

RESPONDENT

CORAM:

NDERINDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. MKHWANAZI

FOR RESPONDENT: ADV. D. SMITH

J U D G E M E N T - 29/11/05

As an opening remark, for reasons not very clear, upon filing of closing submissions by the parties, the matter was not placed before me in chambers for judgement until the 23<sup>rd</sup> November 2005. The delay is regretted.

The Applicant is a former employee of the Respondent Bank. He was employed on the 5<sup>th</sup> may 1988 and was in continuous employment until the 9<sup>th</sup> November 2001 when his services were terminated. He was paid one months salary in lieu of notice upon termination.

At the time he held the position of a Branch Administrator at the Nhlanguano Branch of the Respondent. The Applicant had held the position of Manager Administration at the head office previously. He alleges that he had been demoted for reasons that he solely attributed to racism from the senior management that comprised of whites. When he challenged the demotion, he told the court that senior management made life unbearable for him at the Bank to the extent that he was excluded from manager's lunches hosted at the bank's expense by what he referred in court as the 'white boys'. He gave several examples of discrimination suffered by him as follows:

In 1992 he was supposed to be promoted from manager grade 2 to a notch higher but was bypassed; when he discovered an incident of fraud by an employee by the name of Joyce Shongwe, his report of the same was rebuffed by Mr. Murray, a white manager.

In 1996, he applied to go to routine banking and became Branch manager at Manzini in 1997. He was transferred from one branch to another continuously on what he perceived to be malicious intention by the white management.

This is how in his view, eventually he found himself at the Nhlanguano Branch on short notice in

February 2001. He experienced great hardship with this transfer because he had a child at Sifundzani Primary School. The company house at Nhlango was not made available to him upon transfer hence he had to travel 262 kilometers per day between Nhlango and Mbabane from February up to July 2001.

For this reason, he began to experience financial difficulties that finally culminated in his dismissal. He explained that at the time the bank had two houses at Nhlango but both were leased out to non bankers whilst he continued to suffer.

To cope with the financial difficulties, he would issue out a personal cheque of E20.00 to the bank and take the cash to buy lunch. At the time, his account was at the Mbabane branch. He however issued the cheques at Nhlango. As a result he overdrawn his account. He termed this as unauthorized overdraft as opposed to an authorized overdraft. The unauthorized overdraft according to him was lawful but attracted higher interest.

This overdraft culminated in the charges that were leveled against him upon investigations by the bank. At the time he was charged he had overdrawn his account by E80,00 (Eighty Emalngeni). He was then suspended on the 9<sup>th</sup> November 2001, pending a disciplinary hearing.

He told the court that at the time he had a house bond of about E78,000 (Seventy Eight Thousand Emalngeni) with the bank. That the house was valued much higher than the E78.000 he owed and therefore there was no risk whatsoever posed to the bank by the E80.00 overdraft. The overdraft would automatically be offset upon deposit of his salary at the account at Mbabane. A further justification for his conduct, was that other staff members overdrawn their accounts and no action was ever taken against

them. He perceived the charges and the eventual dismissal as an act of victimization by the 'white boys' who wanted to retain their positions in Swaziland by hook or crook.

The Applicant faced the following charges:

Gross misconduct in that on 1 September 2001 you instructed your subordinate Glen Ndaba to give you E500.00 from his till on the understanding that you would later give him a cheque for it. After your manager had declined to authorize your cheque on the basis that your current account was overdrawn you went on to self authorize the transaction which you had no authority to do and was against bank procedure.

Gross misconduct in that on the 31<sup>st</sup> August 2001, you authorized a transaction by the same teller, Glen Ndaba, on your over drawn current account for the amount of E80 without the necessary authority to do so and against the bank procedure.

Gross misconduct in that on three occasions on or about the dates between the 12<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> September 2001 you requested Cebisile Nkomo to give you cash in the amount of E150.00, E1,000 and E100 respectively, from her till. This was on the understanding that you would refund her later with a cheque which was highly irregular.

You then proceeded to self authorize the transaction on the 17<sup>th</sup> September 2001 for the amount of E100.00 which you had no authority to do and was against bank procedure.

Gross misconduct in that on the 26<sup>th</sup> September 2001 you instructed Cebisile Nkomo to give you cash from her till in the amount of E120.00 on the understanding that you would replace it much later in the day with a cheque. When the transaction was processed upon receipt of your cheque, it generated a referral which was rejected by the supervisor, Lalie Makgathao and your manager, Hebert Magugu Mdluli on the basis that your current account was overdrawn, you then replaced the money the following day. This was highly irregular and against bank procedure ".

See Bundle NR1' pp 27 and 28.

The Applicant was found guilty on all the charges and on the 8<sup>th</sup> November 2001, Mr. 1 P. Mabou the Chairman of the disciplinary enquiry found as follows:

" The example set by Mr. Nhlengetfwa (the Applicant) in that the banks strict and rigid controls which are in place to safeguard unauthorized access to the bank cash assets can be flouted at will, cannot be condoned.

Similarly, by involving his staff in facilitating his actions, were we to impose a penalty other than dismissal, this would create a precedent that may encourage similar incidents of misconduct of this nature.

There is per force an obligation on our part to ensure that the bank is unbending in imposing the severest penalties in cases of serious misconduct

In the circumstances, I rule that Mr. Nhlengetfwases services be terminated with immediate effect.

He is to receive one months salary in lieu of notice". See bundle \*R1' p. 45.

On the 9<sup>th</sup> November the Applicant was dismissed. He appealed the decision on the 12<sup>th</sup> November 2001. On the 20<sup>th</sup> November 2001, the Applicant's appeal was dismissed by Mr. S. C. Ngidi, Director, Group Human Resources. Mr. Ngidi was employed by the Standard Bank in South Africa.

The Applicant was not given opportunity to appear before the appeal tribunal. The Applicant cited the failure to give him a hearing during the appeal as un-procedural and further evidence of victimization by the "white boys".

The Applicant reported this dispute to the Commissioner of Labour. Conciliation efforts by the Commission Mediation and Arbitration Commission (CMAC) failed and a certificate of unresolved dispute was issued on the 3<sup>rd</sup> April 2002. The present application was lodged on the 18<sup>th</sup> October 2002.

The Applicant told the court in his evidence in chief that he had pleaded guilty to the charge of overdrawing his account by E80 without authority. He pleaded for a lesser sentence by way of a warning letter because this was a first offence. During cross examination, he also conceded to have admitted the rest of the charges.

At the time of the dismissal, he earned E7,702.00 (Seven Thousand Seven Hundred and Two Emalangeni) salary per month. On the 14<sup>th</sup> march 2005, he opened up a filling station business. Before that he was unemployed. He was born on the 11<sup>th</sup> June 1947. He was married with three minor children. He had during the period of unemployment suffered a lot of financial difficulties and struggled to maintain himself and his dependants.

Other than the one month notice pay, he had also received payment in lieu of 6 months leave and pension.

He sought reinstatement with payment of arrear salary. In the alternative he sought maximum compensation for unfair dismissal and payment of terminal benefits.

Under cross examination he admitted that the bank lost E52,000 (Fifty Two Thousand Emalangeni) due to negligence with respect to a matter involving one Mr. Ndlela. He however said it was due to the fault of his subordinate but not himself. He alleged that the bank was not consistent in the way it dealt with similar cases of losses. He was not dismissed then though but was demoted. He accepted the demotion in writing. A letter signed by him to that effect was produced in court.

The Applicant did not deny sourcing funds in the manner described in the charge sheet. He however sought to justify his actions in one way or the other under cross examination. He emphasized the fact that these transactions of unauthorized cashments by himself did not result in any loss to the bank.

He accepted however he had been placed in a position of utmost trust by the bank but had breached that

trust by getting involved in unauthorized transactions for his own benefit. He said though that he took cash and replaced it with cheques or cash, and had no intention to steal from the bank. This was a result of financial pressure on him at the time due to the daily travel he had to make between Mbabane and Nhlangano. He could not explain why he continued with similar transactions even after he had been housed at Nhlangano.

He admitted authorizing his own bank transactions. He said that the bank had no rules that prohibited a branch administrator from doing so though he had no prior arrangement with the bank. The unauthorized overdraft at one point exceeded E1.600 (One Thousand Six Hundred Emalangeni).

Instances where he was offered performance bonus and salary increments were cited to dispel any racial bias against him by the management of the bank. He admitted that he had received bonuses and promotions but said that he deserved the bonuses, salary increments and promotions he had received from time to time.

The Respondent called Glen Ndaba (RW1), Cebisile Nkomo (RW2) and Nhlanhla Joseph Kunene (RW3) to justify the dismissal of the Applicant as per the dictates of Section 42 (2) (a) and (b) of the Employment Act No. 5 of 1980.

Glen Ndaba as stated earlier was a teller at the Nhlangano branch where the Applicant was a Branch Administrator. She confirmed that the Applicant asked for E500.00 from her and in exchange gave her a cheque for the same amount. When she captured the transaction in the computer it generated a referral. She went to a supervisor, a Mr. Mdluli for authorization of the transaction but Mr. Mdluli



declined to approve the referral. This meant there were no funds in the account of the Applicant. Later on, she informed the Applicant about the referral and he instructed her to resent the same. The same was approved but she did not know by whom. She told the court that she was not aware of the so called "unauthorized staff overdraft".

Cebsile Nkomo on the other hand told the court that the Applicant requested for cash from her whilst she worked as a teller. He gave her a cheque later and opened the computer to authorize the transaction himself. On the 26<sup>th</sup> September 2001, she had to use her own money to balance the accounts because the Applicant had taken cash but had not given her a cheque in exchange. She said that she was aware that the Applicant had an unauthorized overdraft facility at the bank. She however said she did not understand what the facility was about.

Nhlanhla Joseph Kunene (RW3) was an Internal Auditor with the Bank. He had worked for the bank for 21 years.

His routine work was to conduct internal audits and investigations of untoward transactions in the bank.

He investigated this matter and compiled a report submitted as R23 - 26. He had interviewed both RW1 and RW2 in the course of the investigation. He corroborated their evidence materially.

He told the court that no one in the bank even the Managing Director himself could authorize his own overdraft. These were always authorized by the credit department of the bank.

He refuted the evidence by the Applicant to the effect that there was "unauthorized staff overdraft facility". He said the referral procedure in the bank was in place to ensure authority for each transaction and no one had permission to authorize his own transaction in the manner the Applicant had.

The witness told the court that the Applicant's misconduct was compounded by his involving his subordinates in the same.

The witness was non committal on the issue of racism at the bank but told the court that were such an issue to be raised, the bank would definitely deal with the particular incident.

The report by the witness formed the basis for the charges faced by the Applicant.

He did not testify at the disciplinary hearing though. He told the court that it was normal for an employee who has appealed against an adverse decision to be called to the hearing. He said it was abnormal for the Appeals panel to take a decision before calling the employee to appear before it.

The tellers RW1 and RW2 did not also testify at the disciplinary hearing because the Applicant did not contest their evidence as contained in the reports.

RW3 termed the conduct of the Applicant as depicted by RW1 and RW2 and himself to be gross misconduct. He denied there was bad blood between him and the Applicant. He said he was simply doing his job.

The witnesses for the Respondent have made out a case of gross misconduct by the Applicant on a balance of probabilities. The Applicant did not seriously contest the damning evidence adduced by the witnesses in support of the misconduct he had committed.

The Applicant was clinging on straws in his narration of a long history of harassment and victimization allegedly based on race. Such was completely unsubstantiated and had no bearing to the events at the Nhlanguano branch in the year 2001 that led to his dismissal.

Even if there was any element of truth in the allegations of hardship that he faced upon transfer to Nhlanguano, such cannot be justification for the gross flouting of bank procedures, and the involvement of his subordinates in the questionable transactions whilst he held the position of trust of Branch Administrator.

The failure by the Respondent to call the Applicant to the appeal hearing before dismissing the same should not go without mention. It is most probable that his attendance there may have changed nothing given the admissions he had made and the plea of guilty by the applicant with respect to some of the charges leveled against him.

Unless a party has waived his right to appear before the Appeals hearing or the Agreed procedure Code precludes such appearance, it is most imprudent for an employer to determine the Appeal without hearing the employee. Such may, in appropriate cases compromise what could otherwise have been a good cause to dismiss an employee.

In the case of Num v Zinc Corporation of South Africa 1978<sup>^</sup> 8 IL3 399 (IC) at 502 E-H

It was held that an employee must be informed of the decision and sanction with reasons in the event of an adverse decision and he should be allowed to appeal to another tier of management.

The basic requirements for a fair dismissal are succinctly stated in Articles 4 and 7 of the ILO Convention No. 158 of 1982 (cf part 11 of Recommendation No. 166 of 1982, Standard of general application).

Article 7 deals with the procedural aspect, stipulating that:

"[t] The employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided with an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity'.

Defending oneself relates to every step of the disciplinary process as provided in the code at the undertaking.

In this case, clearly the Applicant was entitled to an appeal hearing in terms of the disciplinary code in place. An appeal process that unilaterally excludes a hearing is fatally flawed. Such a flaw in itself amounts to a negation of justice and should be avoided by all means.

Having said that, upon taking into consideration the evidence before us, the court is satisfied that there

is sufficient justification for the dismissal of the Applicant, in that he has admitted to have conducted himself in a manner unworthy of an officer in a position of high responsibility and trust.

The employer has therefore proven on a balance of probabilities that the Applicant was dismissed for a reason permitted by Section 36 (L) of the Employment Act.

Given the nature of the offences committed, the nature of work he was engaged in and the reckless conduct of involving his subordinates in the misconduct, the Respondent had no alternative but to dismiss him.

Accordingly it was fair and reasonable to dismiss him in terms of Section 42 (2) (b) of the Employment Act.

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT