

THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO, 45/2002

In the matter between:

SINDI MABUZA

APPLICANT

And

NEDBANK SWAZILAND LIMITED

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. M. MKHWANAZI

FOR RESPONDENT: MR. Z. JELE

JUDGEMENT 05,03.07

- [1] The applicant instituted an application for determination of an unresolved dispute against the respondent.
- [2] The applicant is an adult female of Mbabane and a former employee of the respondent.
- [3] The applicant claims that the respondent unlawfully and unfairly terminated her service on the 2nd May 2001 on allegations of gross negligence.
- [4] She further stated in her papers that the termination was unlawful and unfair because the respondent did not have fair grounds for such termination, and that, in all the circumstances of the case, the termination was unreasonable.
- [5] The respondent in its reply stated to the contrary that the termination of the applicant's service was both fair and reasonable, as she was found guilty of gross negligence and dishonesty.
- [6] Although in the Pleadings the respondent stated that the applicant was found guilty of both gross negligence and dishonesty, the evidence revealed however that she was only found guilty on one count, that of gross negligence.
- [7] The evidence led before the Court revealed the following; that she was employed by the respondent as a Bank Clerk in 1990, She was in the continuous employment of the respondent until the 2nd May 2001 when she was dismissed. At the time of her dismissal she was based at the

Simunye branch of the respondent.

[8] She was dismissed because the respondent bank was defrauded of an amount of E119,240:00 that was drawn out of an account that was opened by her at the Simunye branch on the 23rd January 2001. The actual fraud was carried out in the Manzini branch where fraudulent cheques were deposited and withdrawals made soon thereafter resulting in the respondent losing the said amount of E119,240:00.

[9] The respondent was of the view that the applicant was responsible for this loss because she was negligent in the way that she opened the account. The respondent was of the view that she was negligent in that she failed to properly complete the forms that are used when a prospective customer comes to open an account.

[10] The respondent's position before the court was that had the correct procedures been followed, the fraud could have been prevented or at least the culprits would have been traced and apprehended by the police.

[11] The applicant's evidence was that she was unfairly treated by the respondent in that there was nothing that she did not do, which she ought to have done when opening the account. She said the fraud could not have been prevented at any rate even if she had strictly followed the bank's regulations. She also said she was unfairly treated in terms of the sanction of dismissal as her supervisor was not dismissed, yet she was the one who authorized the operation of the account.

[12] The evidence showed that at the time that the account was opened, the applicant's supervisor, Comfort Khumalo was away from the Simunye branch. The evidence revealed that although the account was opened on the 23rd January 2001, it was authorized for operation on the 29th January 2001

[13] On that same day that the account was authorized for operation, the 29th January 2001, the first cheque of E52,320:00 was deposited. On the following day, the 30th January

2001 a cash withdrawal of E2000:00 was made. On the same day a second cash withdrawal of the sum of E35,200:00 was made. On the 31st January 2001, three cash withdrawals were made. On the 14th February 2001, the second fraudulent cheque of 66,920:00 was deposited. On the following day, the 15th February 2001, a cash withdrawal of E25,000:00 was made.

[14] These deposits and cash withdrawals were not transacted at the Simunye branch. There was no evidence that the applicant was aware of these transactions at the Manzini Branch.

[15] The evidence further revealed that the applicant had the authority to open accounts, She was not however the ultimate authority in the process. The ultimate authority was on the supervisor, who authorized the operation of accounts after having satisfied herself that everything was in order.

[16] The applicant was the only witness for the applicant's case. The respondent led three witnesses. All the witnesses that testified on behalf of the respondent were based at the respondent's head office at the time of the incidence. The person who authorized the operation of the account, Comfort Khumalo did not testify. Furthermore, there was no employee of the respondent who was based at the Simunye branch when the incident happened, who gave evidence before the Court.

[17] RW1, Michael Mandla Motsa told the Court that during 2001 he was under the employ of the respondent and was holding the position of bank security administrator. He said he investigated the matter involving the fraud. He said in 2001 there was an influx of South African citizens who opened bank accounts with fraudulent cheques.

[18] He said the bank's staff was put on the alert. He said at the time that the account in question was opened, Comfort Khumalo was not at the branch, as she has had to spend some time at the Matsapha branch.

[19] He said what was strange was that the account was opened with a

zero balance contrary to the bank's procedures. He said during his investigations he learnt that the owner of the account, Siphwe Japhet Ntuli was a friend to a certain Computer Simelane who was a brother-in-law of the applicant. He also said he learnt that Computer and Ntuli used to visit the applicant at the Simunye branch. He did not say who told him that. The person who told him that did not testify in court. That evidence was therefore clearly hearsay and inadmissible.

[20] During cross-examination RW1 admitted that Comfort Khumalo was supervisor and that it was her who authorized the operation of new bank accounts. RW1 further told the court that something went wrong on her part by authorizing the-operation of the account which had a zero balance.

[21] RW1 further admitted that it was normal for South African citizens to open bank accounts locally using their South African identification documents. He further told the court that Comfort Khumalo was not dismissed by the respondent for her mistake. When asked as to what the supervisor should do if the customer information form (CIF) was incomplete, RW1 was evasive, and only said he was not involved.

[22] RW2 Leonard Dlamini told the court that during 2001 he was holding the position of head of operations at the respondent's head office. He said he also investigated the matter. He said he established that most of the account opening procedures were not followed, and that there was no honesty in the manner the account was opened. He said the bank's manuals and procedures were available to all the bank's employees. He said employees had no discretion but to follow the procedures. He said when opening an account there should be a minimum balance, He said if the employee is in doubt as to the integrity of the customer, he should not open the account,

[23] RW2 said in his investigations he found that procedure was not followed when Mull's account was opened because he was not escorted by the applicant to pay the first deposit and secondly, the customer information form was not fully completed.

[24] RW2 said he made an inference that there must have been a contact between Ntuli

and the applicant because on the 29th January 2001 when the account was authorized for operation, other details like the telephone and cellular phone numbers that were not there when the customer came to open the account on the 23rd January 2001. He further said once an account is opened, it's the bank employee's duty to notify the customer.

[25] RW2 said both the applicant and her supervisor, Comfort Khumalo were disciplined. Comfort was charged with negligence and the applicant was charged with gross negligence and dishonesty. He said Comfort was charged with negligence because she should have checked the forms before authorizing the operation of the account. He said Comfort was given a final warning,

[26] RW2 further told the court that at the time of this incidence, the applicant was due to be disciplined for misappropriation of funds. He said the fraud could not have taken place, but for the negligence of the applicant. During cross-examination RW2 denied that the applicant had discretion to open or not open the account. He agreed that the applicant was not the ultimate authority in the opening of accounts.

[27] During cross-examination RW2 said that there is another way of ensuring that the first payment is made other than escorting the customer to the teller. He said such could be done by the bank employee taking the money from the customer and going to give it to the teller. He agreed that it was not always the case that the customer was literally escorted to the teller to make the first payment. He further agreed that no bank employee was ever dismissed for failure to follow a customer to the teller.

[28] When it was put to him that, the reason that no bank employee was ever dismissed was because the procedure has never been followed, RW2 disagreed and said it was followed. It is not clear how RW2 knew that the procedure was being followed as he was not a bank clerk at that time, and was not based at the Simunye branch at the time the incident occurred. He had just earlier on told the court there were other ways of ensuring that the first deposit was made.

[29] It seems that RW2 only wanted to give to the court evidence that would suit his employer's interests in the matter.

[30] RW3 Neville Loader told the court that he is the head of corporate banking. He chaired the disciplinary hearing. He said the applicant was in a position of trust. He said the applicant was found guilty of gross negligence. He said the bank was on the lookout during the period in question as there were many incidences of fraud, He said the recording of the proceedings was done by long hand,

[31] ANALYSIS OF THE EVIDENCE;

The court accepts the evidence that fraud incidences were high and the bank's branches were told to be on the alert. The customer information forms that were filled by the applicant appear as pages 21-23 of annexure "R1".

[32] These documents clearly contained scanty information about the customer. The spaces for telephone and cellular phone numbers are blank. Again the space for nationality, customer status, business principals and contact person was left blank. If there was a fraud alert, clearly the applicant should have done better than to leave so many blank spaces in this important bank form.

[33] The court has no doubt that the applicant's performance as regards the filling of the customer information form was shoddy.

[34] The other ingredient of the negligence as per the respondent's evidence was that the applicant failed to escort the customer to the teller to make the first payment. The applicant did not deny that she did not do that. She said they did not follow that procedure as it was impractical and has never been followed at that branch.

[35] The court does not accept the applicant's explanation, As an employee, she had a duty to adhere to the rules set by the employer. Rules are put in place so that they are followed. The applicant clearly had no right to do things her own way and ignore the employer's rules. Every workplace has rules for its day-to-day operations.

[36] The bulk of the evidence on behalf of the respondent was trying to show the applicant as being an accomplice to the perpetration of the fraud.

[37] There are indeed questions that were left unanswered. These questions could only be answered by people who were not part of the witnesses that were paraded in court. One of the questions is, who supplied the additional information about the account holder's particulars as it appears on page 24 of "R1".

[38] On page 24 there is additional information about Ntuli, which does not appear on pages 21-23, the customer information form. The applicant said she did not know where that information came from.

[39] Page 24 is a computer extract showing full details of the account holder, Mr. Ntuli. According to the document, the inputter was the applicant. The applicant said that the customer may have given that information to Comfort Khumalo who authorized the operation of the account. The applicant was asked as follows:-

"Q, So someone else can put more information. A. Yes, my supervisor can do that. She could edit the form."

There was no suggestion that the applicant was not telling the truth when she said that. The only person who could have clarified this issue was Comfort Khumalo,

Furthermore the applicant's evidence that her password was used by the other staff members at the branch was not disputed.

The respondent also wanted the court to infer that the applicant was part of the scheme to defraud the bank because she allowed the customer to use a South African identity document even though he had told her that he was a Swazi. The applicant's evidence however, that it was common in that area for the people to be in possession of South African identity documents and use them to open accounts was not challenged.

As that part of her evidence was not challenged, the court cannot therefore make any negative inference against her as to why she opened this account.

The respondent also wanted the court to infer complicity because of her "eagerness" to open the account on the 23rd January 2001 as the supervisor, Comfort Khumalo, was not there. The applicant however told the court that she got a go ahead to open the account on the 23rd January 2001 from Matsapha. That evidence was not disputed.

It was argued on behalf of the respondent that indeed there was an "eagerness" on the part of the applicant to open the account for Mr,

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Ntuli, as there was evidence that another customer by the name of Mrs. Taruvinga also came to the bank for a similar service but could not do so immediately as there was a problem with the computers.

That argument was based on what appears on page 26 of "R1". Page 26 is a statement, written by the applicant explaining the events of the 23rd January 2001 when Ntuli's account was opened, In her explanation the applicant said that she was able to vaguely remember what happened on that day because she remembers this lady customer by the name of Mrs. Taruvinga who also came to open an account. The applicant said the lady however preferred to only fill the forms and to come back later.

There was no evidence that Mrs. Taruvinga's account was not indeed opened later on that day. This court cannot therefore make any inference that Mr. Ntuli was given special treatment.

The respondent also wanted the court to infer a criminal motive on the part of the applicant from her conduct of opening the account without a cash deposit having been paid by the customer. The applicant said that even though the customer was carrying a cheque, Matsapha branch authorized her to open the account. Again, this evidence could only be disputed by the person that the applicant talked to in Matsapha. The applicant further said there was nothing stopping her, as the cheque was a Nedbank cheque. She said if it was a cheque from another bank, for example, Standard Bank she could not have allowed it.

It is difficult for the court to fault the applicant. The procedures of the bank that the court was referred to appear on pages 15-16 of "R1". On paragraph (f) they only provide that the employee must escort the customer to the teller to make the initial deposit. They do not specify that the deposit must be in cash and not a cheque.

The procedures also state that the minimum balance is E50. They do not specify that the amount of E50 must be in cash and not a cheque. The court heard that there are now amended or new rules in place providing for a minimum of E500.00. That document was not however produced in court.

If the applicant flouted the procedures by allowing the account to be opened without the cash deposit of E500.00, it means that the person in Matsapha branch who gave the authority was equally guilty. From the evidence presented in court no officer from Matsapha branch was disciplined.

From the evidence presented before the court therefore, the court is not in a position to find or infer any complicity by the applicant with the perpetrators of the fraud.

It was clear to the court from the evidence led before it that the respondent has serious security and supervisory challenges. It seems that the bank employees, especially at the Simunye branch did as they pleased and did not follow the laid down procedures. What was happening at that branch was far below the operation standards of a banking business.

When Comfort Khumalo went away for sometime it is not clear why an acting supervisor was not immediately sent to fill that position.

It is also not clear to the court why did Comfort Khumalo authorize the operation of the account if there was anything suspicious about the personal details of the customer. As the supervisor, if there was anything wrong with the manner that the account was being opened, she had the duty to stop everything and not authorise the operation of the account.

The applicant was junior and under the supervision of Comfort Khumalo. As the supervisor, Comfort had an extra duty to exercise caution that no fraudulent accounts are opened. Her responsibilities as the supervisor of the branch were over and above that of the applicant.

It is not clear to the court why a lesser charge was preferred against her in the circumstances of this case. The evidence showed that she was only charged with negligence, and the applicant was charged with gross negligence.

The evidence revealed that Comfort was the ultimate authority in the opening of accounts. RW2 told the court during re-examination that

Comfort should have made sure that the first deposit had been made, She did not, but went on to authorize the operation of the account.

Why was it then that the person who had the ultimate authority was treated to a lesser charge and a lesser punishment than her junior whose actions she could check?

That, is the reason why the applicant says that her dismissal was not based on fair grounds and that in all the circumstances of the case her dismissal was unreasonable.

It seems to the court that the applicant was discriminated against in terms of the charges. The evidence revealed that when this incident happened, there was a disciplinary hearing pending against the applicant for misappropriation of funds. The chairman of the hearing made a finding that the commissions and omissions of the applicant were calculated moves. The chairman was obviously influenced by the story that Ntuli was a friend to the applicant's brother-in-law and that these two came to the Simunye branch at some point.

There was no evidence before the court that the applicant knew Ntuli.

The court, as already pointed out, cannot make any assumption that the applicant was part of a syndicate. A court can only make an inference based on proved facts.

[64] Further, the negligence that the applicant committed in the opening of the account was stoppable or reversible. Her supervisor Comfort Khumaio had the opportunity, as the ultimate authority in the opening of accounts to stop the process by simply not authorizing the operation of the account.

[65] The applicant was negligent in the opening of the account, as she did not follow the laid down procedures. Comfort Khumaio was equally negligent in authorising the operation of the account without making sure that the first deposit has been made.

[66] Because of the disparity in the treatment of the officers, it cannot be said that the dismissal of the applicant was fair.

[67] **SECTION 42 (2) OF THE EMPLOYMENT ACT NO.5 OF 1980**

provides that: -

"The services of an employee shall not be considered as having been fairly terminated unless the employer proves -

a) That the reasons for the termination was one permitted by section 36;

and

b) That taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee."

[68] It is not enough for the respondent therefore to merely say that the applicant was dismissed in terms of section 36 of the Employment Act. The respondent had to also prove that taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant.

[69] Taking into account all the circumstances of this case, it was not fair for the respondent to dismiss the applicant only, in circumstances that showed that both the applicant and her supervisor were equally guilty of negligence.

[70] The argument on behalf of the respondent that it is a banking undertaking that handles clients' money and that, those who work there should be circumspect, applies with equal force to the applicant's supervisor Comfort Khumalo, who was not dismissed but given a final warning.

[71] Comfort Khumalo had a bigger responsibility as the supervisor at the branch vis-a-vis the applicant. She had the opportunity to stop the operation of the account, but she failed and went on to authorize the operation of the account, which had a zero balance.

[72] In the circumstances of this case, the conduct of the respondent was clearly unreasonable and discriminatory.

[73] Taking into account all the evidence presented and all the foregoing observations, court comes to the conclusion that the applicant's dismissal was unfair.

[74] The applicant's application therefore succeeds.

[75] REMEDY

The applicant is thirty-eight years old. She has one child. She is now not married. She is currently employed as a teacher at Mpuluzi. She started working there in 2006 during the second term. She earns E2,200:00 per month. Whilst she was still under the employ of the respondent she was earning E4,600:00 per month.

[76] The respondent in its replies stated that the applicant was paid all outstanding leave. In court however, the applicant's evidence that she was applying that she be paid all the benefits as they appear in her papers was not challenged.

[77] The court will therefore grant the prayer for leave on the condition that the respondent produces documentary proof of the payment to the applicant or her attorney. If the respondent does so it will not be obliged to pay the leave pay.

[78] The court will also take into account that the respondent lost a substantial amount of money, which was drawn from the account opened by the applicant and authorized for operation by her supervisor. That amount was not recovered.

[79] Taking into account all these factors the court will order that the respondent pays the applicant six months' salary as compensation for the unfair dismissal.

[80] The court will accordingly make an order that the respondent pays the applicant the following amounts as her terminal benefits and compensation for the unfair dismissal:-

A) LEAVE PAY (ON THE CONDITION STATED)	E4.559.40
B) NOTICE PAY	E4,559.40
C) ADDITIONAL NOTICE	E7J44.00
D) SEVERANCE ALLOWANCE	E19,360.00
E) COMPENSATION (E4,559.40 X 6)	<u>E27.356.40</u>
	<u>E63.579.20</u>

The members agree.

**NKOSINATHI NKONYANE: ACTING JUDGE
INDUSTRIAL COURT**