

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 64/2004

In the matter between:

PHEPHILE DLAMINI
Applicant

and

CONCO SWAZILAND

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: L. ZWANE

FOR RESPONDENT: Z. JELE

J U D G E M E N T - 22/08/07

1. In 2001 the Applicant was a registered student at the University of Swaziland doing her second year of the programme for a diploma in commerce. The Human Resources Manager of the Respondent offered her a temporary holiday job. She worked for a month in the human resources department, then accepted a further two months temporary employment in the Finance department assisting with fixed asset verification. She was supervised by the Accounting Manager, Bimal Da Silva.

2. The Applicant failed her second study year and after the holidays she returned to University to repeat the year. At the end of the academic year in May 2002, she was again offered a holiday job for 3 months by the Human Resources Manager, which she accepted. She continued with fixed assets verification work in the Finance department.

3. In July 2002 the Applicant learned that she had again failed her second year of the diploma in commerce study course, and that she was discontinued from the diploma course. She informed the Finance Manager Trevor Ncala. When her period of temporary employment ended, Ncala offered to extend her employment up to the end of December 2002. She was to help wherever needed in the Finance department. She accepted and worked to the end of the year. She was subsequently contracted by the Respondent for a further two and three months periods respectively during the first half of 2003.

4. In May 2003 the Respondent advertised internally within its organization inviting applications for the permanent post of Accounts Receivable Clerk in the Finance Department reporting to the Accounting Manager. The advertisement came from the office of the Human Resources Manager Fazoe Gumedze, and was circulated by email. The advertised qualifications for the post were a diploma in Commerce or AAT Level 3 and three years experience in finance. Interested parties were required to apply to the Human Resources Manager enclosing their curriculum vitae ("CV").

5. The Applicant testified that at first she ignored the advertisement because she did not have the necessary academic qualifications nor the experience. Nevertheless she was approached by Ncala, the Finance Manager who encouraged her to apply. When she pointed out that she did not qualify, Ncala said that he would talk to the Human Resources Manager Gumedze and the Accounting Manager Da Silva. Later, Gumedze also encouraged the Applicant to

apply. Asked how she should draft her application since she never fulfilled the requirements, the Applicant alleges that Gumedze said she should write him a covering note and attach her CV. He said he would edit the CV where necessary, after which he would return the application and CV for her signature.

6. The Applicant says Da Silva also approached her and endorsed her as a candidate for the job because she had worked for some time in the Finance department.

7. On 17th September 2003 the Applicant sent an email to Fazoe Gumedze, stating:

"I am hereby applying for the post of being an AR Clerk which has been advertised on the email sent internally. I have also attached my curriculum Vitae."

8. The Applicant attached her CV to the email. The CV sets out her personal details, education, employment history, areas of experience and references. Under Education, the CV states inter alia:

"University of Swaziland : Diploma in Commerce."

9. The CV details the areas of experience covered by the Applicant during her temporary employment at Coca-Cola from May 2002 to the date of application.

10. The Applicant was invited to an interview. Gumedze sent her the interview guidelines through his assistant to help her prepare. The interview was chaired by Bimal Da Silva. Bongsi Nsingwane represented the Human Resources Department. Also present was Musa Nkambule from the finance department. The Applicant was interviewed. Da Silva and Nsingwane had copies of the CV in front of them, but she was not questioned about the contents. She was not asked to produce any academic certificate.

11. After some days, the Applicant was informed by Da Silva that her application was successful. According to the Applicant, Da Silva said she was chosen due to her work experience on the job. The Applicant testified that Da Silva asked her how she would continue at school if she was employed full time, and she told him she would study part-time.

12. The Applicant signed a contract and commenced permanent employment on 2nd June 2003 under the supervision of Bimal Da Silva.

13. A few months later, the Accounting Manager initiated disciplinary charges against the Applicant alleging dishonesty by falsification of company records for personal gain. The Applicant was dismissed after a disciplinary enquiry. On appeal, the Managing Director of the Respondent found that the sanction of dismissal was too severe and he reduced the sanction to a final written warning. The Managing Director told the Applicant that he was reinstating her, and she should resume work the following day. The minutes of the appeal hearing conclude:

"The appeal hearing was adjourned and all the parties were advised that there is the last of completing all the necessary paper work."

14. On reporting for work the following day, her manager Da Silva told her not to start working until she had signed certain procedural documents. She was kept waiting for most of the day, then served with a letter of suspension and a notice to attend a new disciplinary enquiry. The charge was *"dishonesty, in that in your application for employment you indicated in your CV that you possess a diploma in Commerce from the University of Swaziland. The company believes that you gave false or misleading statements because of an allegation that you do not possess the above mentioned qualification."*

15. The Applicant attended the disciplinary enquiry. At its conclusion on 22 September 2003 she was dismissed. She complains that the hearing was procedurally unfair because:

15.1. she had not been procedurally reinstated as an employee after the previous disciplinary appeal therefore she was not susceptible to further disciplinary action;

15.2. she was denied her right to gather evidence, because her request for a copy of the CV referred to in the charge was not complied with;

15.3. her request to call Fazoe Gumedze as a witness was refused.

16. The Applicant appealed on these grounds to the Managing Director, but her

appeal was dismissed. She reported a dispute to the Labour Commissioner, but the dispute remained unresolved after conciliation at CMAC. She then instituted proceedings in the Industrial Court claiming reinstatement alternatively notice pay, leave pay and maximum compensation for unfair dismissal. She alleges that her dismissal was substantively unfair because she never at any point professed to hold a diploma in commerce, and in any event the Human Resources Manager Gumedze and the Accounting Manager Da Silva were aware that she never possessed a diploma. She also alleges that her dismissal was procedurally unfair for the reasons set out in the preceding paragraph.

17. Under cross-examination, the Applicant confirmed that she incorrectly represented in the CV she sent to Fazoe Gumedze that she had a diploma in commerce. She said she did so because she was sending the CV to Gumedze for editing and she expected him to correct the draft. Asked whether Gumedze had told her to include the false qualification in her CV, she replied that he did not give her the exact words to write, he just said she should send him a draft for editing.

At a later stage, she changed this evidence and said that Gumedze told her to write in her CV that she was "pursuing" a diploma in commerce. She conceded that she was not in fact pursuing a diploma at the time she sent the CV to Gumedze because she had failed and been discontinued from her studies a year previously and she had not enrolled with any other institution. She agreed that she and Gumedze colluded to include a false statement in her CV, namely that she was pursuing a diploma in commerce, but she said it was merely a draft subject to amendment. She offered no explanation as to why she represented in the CV that she has a diploma, not that she was "pursuing" a diploma.

18. The Applicant claimed rather belatedly in cross-examination that she wrote the CV in 2002 when she was still a student. She said she wrote it for her personal file, and included the diploma in commerce because she was studying for the diploma at that time. This evidence did not tally well with her earlier testimony that she inserted the reference to a diploma in May 2003 when she wrote a draft CV to be edited by Gumedze. Pressed by Respondent's counsel, the Applicant backtracked and said she couldn't remember when she prepared the CV. The Applicant's credibility was not unscathed by the cross-examination on this issue.

19. It was put to the Applicant that prior to the interview she personally gave a copy of the false CV to the chairman of the interview panel, Bimal Da Silva. She

denied this. She was asked why she never enquired as to the contents of the CV at the interview, since according to her she had never seen or submitted the final edited version. She explained that she did not tell the panel about the CV because she was only supposed to answer what she was asked.

20. The Applicant was also asked why she never alerted Bimal Da Silva when she was appointed as AR Clerk that she never had the required educational qualification as stated in the job description, namely Diploma in Accounting/Finance or AAT Level Three. The Applicant replied that Da Silva already knew that she never had a diploma and he had even asked her when she was going back to school to complete the diploma.

The Applicant stated in cross-examination that she intended to call Fazoe Gumedze as a witness to confirm that he undertook to edit her draft CV. The Applicant however closed her case without calling Gumedze.

Bimal Da Silva testified as the Respondent's first witness. He stated that the Applicant gave him a copy of her CV in his office prior to the interview. The Human Resources representative Bongi Nsingwane obtained a copy from Human Resources department. The CV represented that the Applicant had a diploma in commerce. He said the panel relied on this representation in concluding that the Applicant qualified for the post. He never requested the Applicant to produce her certificate because verification of academic qualifications is normally done by Human Resources department once a candidate is selected for the post.

Da Silva denied that he knew the Applicant never had the diploma. He said that he knew she had been studying at the university, but he did not know the details of her educational background. He did not know she had failed the diploma course and been discontinued. He also denied that he encouraged the Applicant to apply for the position. He said he had the final say as the hiring manager. He was prepared to waive the advertised requirements regarding 3 to 5 years experience because the Applicant had worked well in his department previously and he believed she had the required academic qualification.

24. Da Silva said that someone told him that the Applicant never had the diploma. He confirmed this with the university authorities, then instituted disciplinary action against the Applicant.

25. Under cross-examination, Da Silva conceded that he had signed the

Applicant's job description, notwithstanding that it stated that 3 to 5 years experience was required and he knew that the Applicant did not have this experience. He said some leeway could be given on experience, but the academic qualification was prescribed by the company and could not be waived.

26. It was put to Da Silva that when he served notice of the disciplinary charges on the Applicant, she had not yet been reinstated following her successful appeal against a previous dismissal. He said the fact that she had reported for work showed she was reinstated.

27. Da Silva was asked whether he recalled that the Finance Manager Trevor Ncala admitted at the disciplinary hearing that he knew that the Applicant was discontinued from her studies and encouraged her to continue. Da Silva denied that Ncala said this, but was forced to retract when the minutes of the hearing were shown to him. He maintained that even if Ncala knew that Applicant did not have the diploma, this was never divulged to him.

28. The Respondent also called its Human Resources Officer Bonginkosi Nsingwane as a witness. He confirmed that he attended the Applicant's interview as Human Resources representative on the instructions of his manager Fazoe Gumedze, who gave him a copy of the Applicant's C.V. Gumedze never told him the CV was only a draft. Nsingwane said Bimal Da Silva came with a similar CV. The other person present was Musa Nkambule, a non-managerial observer who attended as employee representative to ensure a fair and transparent interview.

29. Nsingwane confirmed that it was the duty of his department to verify the Applicant's academic qualification and references. He said this was not done in the case of the Applicant. He implied that the normal procedure was relaxed because she was already working for the company and his manager supported her application. He said Gumedze stated that preference should be given to the Applicant as an internal candidate. There were about three other candidates for the job, all external. He denied that he gave the Applicant the interview guide to help her prepare for the interview.

30. Nsingwane was asked what paperwork had to be completed after the Applicant's successful disciplinary appeal. He said it was only the final written warning and the disciplinary report. He insisted that the warning was signed by the Applicant on the date of the appeal verdict. Under cross-examination he was

forced to change to say the warning was signed on the day after the verdict. Confronted with evidence in the minutes of the disciplinary hearing that the final written warning had not been signed by the Applicant, he was unable to deny that he had given false testimony on this issue. It was then put to him that he had failed to obtain signature of the necessary paperwork as directed by the appeal chairman and the Applicant was accordingly never reinstated. He replied, "it would appear so."

31. On the question of the Applicant being denied her right to gather her evidence, Nsingwane confirmed that the Applicant requested a copy of her electronic application for the post of AR Clerk. He said he could not give it to her because he never had it. He confirmed that the email was retrieved by the chairman during the hearing. He could not explain why he never retrieved it from Fazoe Gumedze.

32. This witness also agreed during cross-examination that the Applicant was denied the opportunity to call Fazoe Gumedze as a witness at the disciplinary enquiry. In re-examination he backtracked and said he did not recall the Applicant asking for Gumedze to be called as a witness.

33. The court asked Nsingwane whether the Applicant was an employee of the Respondent when she applied for the permanent post. He replied that technically she was not, and she was regarded as an external Applicant. This evidence of course flew in the face of his previous assertion that the Human Resources Manager told him preference should be given to the Applicant over external candidates because she was a temporary employee.

34. Mr. Nsingwane made a poor impression as a witness. In a number of instances his forceful assertions of fact were proved to be untrue.

35. Fazoe Gumedze left the Respondent's employ some years ago. Neither party called him as a witness. It is perhaps unfair to judge him without having heard his version of events but based on the evidence of the Applicant and Nsingwane the finding is unavoidable that he manipulated the appointment of the Applicant as AR clerk in a most unethical manner. On the evidence Gumedze was well aware that the Applicant did not have a diploma in commerce. He sent Nsingwane to the interview with a CV which he knew contained false information. He gave the Applicant an unfair advantage over the other candidates by giving her the interview questionnaire in advance. He influenced Nsingwane to recommend the

Applicant's appointment, and he suppressed the checking of credentials that would in the normal course of events have exposed the Applicant's lack of academic qualifications.

36. This conduct of Gumedze does not however exonerate the Applicant. We are unable to accept her version as to why she included a false qualification in her CV. In our view it is irrelevant whether the Applicant drafted the CV in 2002 when she was still a student or in 2003 for purposes of her application. Creating a fantasy CV is one thing, submitting it to the Human Resources Manager in support of a job application is quite another. If she intended the false qualification to be edited out, why include it in the first place. On the Applicant's version, Gumedze knew she never had the diploma. Her inclusion of this qualification in her CV leads unmistakably to one inference only: there was collusion between herself and Gumedze to create a false CV.

37. The electronic job application the Applicant sent to Gumedze did not mention editing the attached CV. According to the Applicant, she and Gumedze had a private editing arrangement. Senior managers are not in the habit of editing CVs for junior temporary employees. The Applicant has advanced no explanation for Gumedze's unusual patronage. Her lack of candour reinforces the impression of a cozy collusion that was not professional. In our view, the collusion regarding the CV was not mentioned in the email because it was intrinsically dishonest.

38. The important question that arises is whether Bimal Da Silva knew that the Applicant did not have the diploma but employed her nonetheless. The Respondent can hardly complain that it was deceived by the Applicant's CV if the hiring manager knew the true position.

39. The Applicant alleges that Da Silva knew she failed the diploma and asked her whether she would resume her studies. This allegation was vehemently denied by Da Silva. There was no other evidence to corroborate either witness' version, so the court must determine the issue on the basis of the probabilities.

40. The Applicant gave no reason why Da Silva should have had personal knowledge of her education status. She never said that she told him that she was studying for a diploma in commerce, or that she had been discontinued. There was no reason for Da Silva to make enquiries about her qualifications prior to the interview. There was no evidence that Da Silva had any form of personal

relationship or contact with the Applicant as a result of which he might have taken a personal interest in her background. There is no reason why Trevor Ncala or Fazoe Gumedze should have shared their knowledge about the Applicant's education with Da Silva, and there is no evidence that they did so.

41. If the Applicant was to be employed without the required academic qualification, there was no point in including the false qualification in her CV. In our view, the inclusion of the diploma in commerce in the CV was calculated to deceive, and there would have been no purpose in the deception if the hiring manager knew the Applicant did not have the diploma. Finally, it is improbable that Da Silva would have laid charges against the Applicant based on the false CV if he knew all along that she never had the diploma.

42. The probabilities favour Da Silva's denial that he had prior knowledge of the Applicant's precise educational status. Although Da Silva's testimony was not unblemished, the inconsistencies appeared to be due to memory lapses rather than any propensity to falsehood. The Applicant's testimony, on the other hand, was in general farfetched and she was not a credible witness.

43. Our conclusion on the facts is that the Applicant knowingly and deliberately included the false reference to a diploma in commerce in her CV with the intention of deceiving the hiring authority of the Respondent and obtaining employment as Accounts Receivable Clerk.

We also accept Da Silva's evidence that the false CV was given to him by the Applicant. We also find that Bimal Da Silva as the hiring manager was induced to employ the Applicant by her fraudulent misrepresentation.

44. The Respondent amended its Reply to raise an alternative common law defence of fraudulent misrepresentation entitling it to void the employment contract. In a case where a fraudulent misrepresentation is made prior to the conclusion of an employment relationship and induces the employer to enter into an employment contract, the employer may exercise its common law right to void the contract. The labour laws do not apply because the dishonest conduct occurred prior to the formation of the employment relationship, and a valid contract was never concluded. In the present case, however, the Applicant was already employed, albeit on a temporary basis, when she made the fraudulent misrepresentation. The provisions of the labour laws applied, and the Respondent was required to apply its disciplinary procedures.

45. The Applicant argues however that she had already been dismissed at a previous disciplinary enquiry, and the decision of the appeal chairman to reinstate her had not been implemented by the time she was served with the subsequent notice of a disciplinary hearing, because the necessary paperwork had not been completed.

46. The appeal chairman was Ian King, the Managing Director. It appears from the minutes of the appeal hearing that the chairman reduced the sentence of dismissal to a final written warning. The chairman's verdict was a final decision, not a recommendation. The effect of the verdict was that the decision to dismiss the Applicant was set aside. She was automatically restored to her status as an employee.

47. The chairman's concluding statement that "*there is the last part of completing all the necessary paperwork*" meant simply that the records of the Respondent should be endorsed to reflect the decision. In other words, she should be re-registered as an employee and served with the final written warning. The reinstatement of the Applicant was not dependant on the formal paperwork. It occurred when the chairman pronounced his decision.

48. The Applicant was not served with the final written warning prior to her dismissal on the 22nd September 2003. There is no evidence that the warning was taken into account. Indeed it could not have been, because the offence for which the Applicant was dismissed was committed prior to the decision to give her a final written warning. Nothing turns on the issue of the warning.

49. The Applicant says she was denied her right to gather evidence for her disciplinary hearing because her request for a copy of the CV and covering email she sent to Gumedze was not complied with. The issue was raised by the Applicant at the hearing when she denied that the CV produced at the hearing by Bimal Da Silva was the same as the CV she sent to Gumedze. She demanded that she be given a copy of the CV she sent electronically to Gumedze.

50. The chairman undertook to obtain the documents before he made his decision. The documents were duly accessed from the Applicant's sent items, and copies were sent to Applicant and her representative. After verifying that the CV was the same as the one produced by Da Silva, the chairman found the Applicant guilty of dishonesty.

54. For the above reasons, we are unable to find that the termination of the Applicant's services was substantively or procedurally unfair. The Applicant was guilty of serious misconduct involving dishonesty. The misconduct struck at the root of the employment contract, and destroyed the relationship of trust. The Respondent could not reasonably be expected to retain the services of an unqualified and dishonest clerk in its finance department.

55. The Respondent has discharged the burden of proof resting on it in terms of section 42 of the Employment Act 1980. The application is dismissed.

56. On the question of costs, we are of the view that the Respondent's human resources department colluded with the Applicant in misrepresenting her qualifications to Bimal Da Silva, and the Applicant was to a certain extent influenced to make a false CV. The Respondent must bear some responsibility for this. Each party must pay its own costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT