

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 55/2007

In the matter between:

THOKO NOMBULELO GUMEDZE

Applicant

and

SWAZILAND DEVELOPMENT AND SAVINGS
BANK

Respondent

CORAM:

P. R. DUNSEITH JOSIAH YENDE NtJiiOLAG
A/IANANA

PRESIDENT
MEMBER
MEMBER

FOR APPLICANT FOR RESPONDENT

ZWELI JELE MUSA SIBANDZE

J U D G E M E N T -31/03/09

1. The Applicant has applied to the Industrial Court for determination of an unresolved dispute arising out of the Respondent's termination of her services. In her particulars of claim she alleges that the termination of her services on 10th May 2006 was substantively and procedurally unfair in that:-
 50. There was no valid reason for the termination of her services, in that she did not commit the offences charged and the termination was not in accordance with Section 36 of the Employment Act 1980;
 51. Taking into account all the circumstances of the matter it was

unreasonable to terminate her services;

52. The chairman of the disciplinary hearing was biased, did not consider the evidence and submissions of the Applicant, and also denied the Applicant an opportunity to present her case fully;
53. The appeal was procedurally flawed and the Respondent without justification failed to follow the recommendations of the appeal chairman
54. The Applicant is claiming payment of statutory terminal benefits, leave pay and 12 months salary as compensation for unfair dismissal.
55. The Respondent in its Reply denied that the termination of the Applicant's services was substantively or procedurally unfair, and averred that the Applicant's services were terminated fairly in terms of section 36 (j) of the Employment Act "for gross insubordination and refusal to obey instructions, in that on about the 15th, 17th, and 22nd February 2006, in willful disregard of and against her superior's specific instructions she proceeded and solicited and accepted or caused to be solicited and accepted quotations from potential suppliers of filing equipment and she interviewed the said potential suppliers of filing equipment."
4. The burden of proving that the Applicant's services were fairly terminated rests on the Respondent. In order to discharge such burden, the Respondent must prove that the reason for termination is one of the fair reasons contained in section 36 of the Employment Act, and that it was reasonable to terminate the services of the Applicant.

See section 42 of the Employment Act 1980.
56. The Applicant is an admitted attorney. She was employed by the Respondent in 2003 as a Senior Legal Officer on Grade M5. She was assigned to the Respondent's litigation department. She reported to the Legal Advisor Doris Tshabalala.
57. In 2004 the Applicant was consulted by the Legal Advisor regarding a proposed transfer to' the conveyancing department. The Applicant resisted the transfer. She considered conveyancing work to be routine and

monotonous. The position was previously held by a Legal Officer, and the Applicant perceived the transfer as a demotion. She also believed that she was being transferred to make way for a new recruit as Senior Legal Officer (Litigation), namely one Muzi Matsebula. Despite her strong opposition, the Applicant was transferred. She remained a Senior Legal Officer on the same grade.

58. In the view of the court, this transfer fell with the Respondent's prerogative to manage its business affairs as it saw fit. The Respondent was entitled to upgrade the status of the conveyancing department by appointing a Senior Legal Officer to take charge. The Applicant conceded in court that she had no vested right to remain in the litigation department. Nevertheless she refused to move to conveyancing until she received a direct instruction from the managing director.
59. The Applicant says that this transfer soured her relationship with the Legal Advisor. In the court's view she overreacted to the disappointment of her forced transfer. She "punished" the Legal Advisor by severing civil relations. The Legal Advisor perceived her as hostile and uncooperative. The Legal Advisor's attempts to re-establish a normal working relationship were rebuffed. The Applicant maintained a sullen "business as usual" attitude which discomfited her supervisor and created fertile soil for the misunderstandings which followed thereafter.
60. In 2005 the poor relationship between the Applicant and the Legal Advisor prompted the latter to arrange the Applicant's transfer to Recoveries Department. This department had been established to recover classified debts. To avoid confrontation, the Legal Advisor arranged for the Human Resources Manager to discuss the transfer with the Applicant. The Applicant refused to accept the transfer. She argued, with some justification, that the Recoveries Department has a limited lifespan and as soon as the classified debts had been recovered or written off she would become redundant. She also argued, again with some justification, that the transfer was a demotion because she would be reporting to an officer who was more junior than the Legal Advisor.
61. According to the Applicant, Doris Tshabalala called her and told her she would be transferred to Recoveries whether she liked it or not. Doris denied saying this, but we think it likely that Doris said words to this effect because she was finding it intolerable to work with the Applicant. Indeed she wrote a

letter of transfer following this meeting.

62. The Applicant resisted the transfer and lodged a complaint with the Labour Commissioner under section 26 of the Employment Act 1980. The Managing Director of the Respondent thereafter conceded that the transfer was not proper and reversed it. The Applicant requested that she report to a different supervisor. The Managing Director rejected this request and suggested that the Applicant take an exit package if she did not wish to work under the Legal Advisor. The Applicant refused this option and elected to go back to conveyancing, but she requested that the Managing Director facilitate a reconciliation meeting between herself and the Legal Advisor. It is most unfortunate that the Managing Director did not accede to this request. As a result, the Applicant returned to her post as Senior Legal Officer-Conveyancing in August 2005 and the frosty relationship between herself and her supervisor continued unabated.
63. In the latter part of 2005 the Respondent took a decision to centralize the storage of its securities. The Legal Services Department was tasked with the "implementation of this decision, and "the Legal Advisor delegated the Applicant to prepare an action plan and supervise the process. One of the responsibilities assigned to the Applicant was to procure the installation at head office of appropriate filing cabinets for the storage of the securities.
64. The Archivist from the Administration Department was engaged to give technical advice on record keeping and filing systems. In a memorandum to the Legal Advisor, he advised that a survey of existing records be carried out, and thereafter that potential suppliers of filing equipment be invited to forward quotations.
65. The Respondent has strict procurement procedures governed by its Tender Policy. Procurement is the responsibility of the Administration Department, which refers procurements in excess of E50.000 to a Tender Committee. The Legal Advisor says she was uncomfortable with the Archivist's suggestion that potential suppliers be invited to forward quotations, since that was not the function of the Legal Services Department nor the Archivist. She says she verbally instructed the Applicant to inform the Archivist that he was not to invite quotations from any potential suppliers. The Applicant however denies that she received any such verbal instruction.

66. A records survey was duly carried out and the Archivist submitted a report. The action plan for the central securities filing facility was thereafter discussed at the monthly meeting of the Legal Services Department held on the 19th January 2006. Doris Tshabalala chaired this meeting as Legal Advisor and head of department. Also in attendance were the Applicant and the Senior Legal Officer Litigation Muzi Matsebula. Minutes of the meeting were recorded by the Legal Advisor's secretary.

67. The Minutes of this meeting record the following item:

"The chairperson stressed to Ms. Gumedze that the Archivist should not obtain quotations for Filing equipment from the suppliers on behalf of the Legal Services Department, that was the function of Tender Committee with referral to be made by the department.

That Ms. Gumedze should obtain a copy of Tender Policy for guidance on procurements procedures.

That the department must follow the Tender Policy and go through the Tender Committee for procurement.

That where appropriate or necessary tender waiver would be obtained from appropriate authority."

68. Doris Tshabalala said she was going on leave for about 3 weeks as from 20th January 2006 and she wished to ensure that there was no breach of the Tender Policy in her absence.

69. The day after the meeting the Applicant wrote a Memorandum to the Administration Manager, copied to the Archivist. The Memorandum states:

"Kindly be informed that the Legal Advisor has advised that the policy of the bank concerning the issue offenders and considering quotations of potential suppliers is that the Department concerned should approach and request suppliers for tenders. The Archivist is requested to give us names of the companies you consider to be potential suppliers of the filing equipment so that this department can approach <, <em ^■jordingiy. Heasc note that we will still'be working together with the Archivist in identifying the best suppliers and until the project comes to fruition."

70. This memorandum was also copied to the Legal Advisor, but she had already departed on leave.
71. The Applicant's memorandum is not consistent with what is recorded in the minutes of the meeting of the 19th January 2006. She says the minutes are not a correct record of what was said by the Legal Advisor at the meeting. However, at the next meeting on 6th March 2006, the minutes were adopted as a true reflection of what transpired on 19th January, without objection from the Applicant. The Applicant says she decided to keep quiet at the meeting of the 6th March because the whole agenda was about her. We think this may be true in respect of the allegations made against the Applicant at the meeting, but we seriously doubt that a trained lawyer like the Applicant would permit false minutes to be confirmed and adopted as true and correct without objection, particularly where the allegations against her were based on such minutes.
72. We also find it most unlikely that Doris Tshabalala gave the advice recorded in the Applicant's memorandum of 20th January, since such advice is contrary to Respondent's procurement policies. In our judgement the minutes correctly record the instructions given by Doris on the 19th January 2006.
73. The question arises whether the Applicant in her memorandum of 20th January deliberately distorted the instructions she had been given by the Legal Advisor at the meeting. We do not think so. Firstly there was nothing the Applicant could gain by deliberately distorting her instructions. If anything, she was giving herself extra work by assuming responsibility for obtaining quotations from suppliers. Secondly, the memorandum was addressed to the manager with direct responsibility for procurement procedures. Such manager could be expected to immediately correct any distortion of the correct procurement procedures. Any deliberate insubordination by the Applicant would thereby be exposed.
74. In the view of the court, the Applicant misunderstood the instructions she was given at the meeting of the 19th January. She did not pay proper attention to what the Legal Advisor told her. We suspect that this may have been at least partly due to the ill will she harboured towards the Legal Advisor. Nevertheless we do not believe that she deliberately set out to pervert or disobey her superior's instructions.

75. Indeed the incorrect procedures set out in the Applicant's memorandum prompted a swift response from the Administrative Manager Njabuliso Mavuso. She testified that on receipt of the memorandum she called the Applicant and told her that what she had written was not correct. All procurements, including obtaining quotations from suppliers, should be done by the Administration Department. The requisitioning department - in this case the Legal Services Department- should not approach suppliers for tenders.
76. Njabuliso Mavuso said she subsequently had a discussion with the Archivist. He explained that he wanted to investigate what filing equipment was available so that the most appropriate system could be installed. He proposed that potential suppliers be invited to make presentations as to the product specifications of their filing equipment. Njabuliso says the Tender Policy allows for preliminary presentations by suppliers to investigate what products are available in the market, one yav3 the Archivist the go-ahead to invite suppliers, but she stipulated that a person from the procurement section in her department should be present.
77. Njabuliso confirmed that the presentation by suppliers was initiated by the Archivist. The Applicant was not present when she gave him the go-ahead. In her evidence in chief, Njabuliso said she later communicated to the Applicant that a person from procurement section must be present at the presentation. Under cross-examination she departed from this evidence. She said she had no further discussions with the Applicant after her meeting with the Archivist, nor did she remember informing her of the requirement that a person from procurement should be present. When it was put to her that the Applicant denied that she informed her of this requirement, she responded, *"It is possible [that I did not inform her]."*
78. On the 8th February 2006 the Applicant wrote to the Administration Manager confirming their previous conversation to the effect that the Administration department is responsible for all procurement procedures, and further confirming the Archivist's telephonic advice that he would be proceeding with presentations by suppliers. This memorandum was copied to the Archivist and the Legal Advisor.

79. The Archivist wrote to the Legal Advisor with a copy to the Administration Manager, on 8th February 2006, stating:

" Our idea now is to invite potential suppliers of the filing system we require for a presentation and see if we can get the correct specification and quantity.

We propose that the presentations should be made on the 15th February 2006 in the Legal Department Office."

80. Muzi Matsebula, the Senior Legal Officer Litigation, was acting as Legal Advisor in the absence of Doris Tshabalala. He had been present at the meeting of 19th January. He did not raise any objection to the proposed supplier presentations.

81. The presentations went ahead on the 15th, 17th and 22nd February 2006. Muzi Matsebula attended and participated in the presentations on the 17th and 22nd February. The Archivist and the Applicant attended on all three days. The Archivist failed to arrange attendance by any officer from the procurement section. At the disciplinary hearing he said he decided not to do so because the process was not at the buying stage. The Archivist is since deceased and he was not called to testify in court.

82. After the presentation the Archivist submitted a brief report to the Legal Advisor. The report states that three companies were interviewed, and contains a recommendation that "the job" be given to one of the companies. Attached to the report are quotations from each of the three companies.

83. On her return from leave, the Legal Advisor concluded from this report that the Applicant had proceeded to solicit quotations from suppliers contrary to her express instructions. At the meeting on 6th March 2006 she demanded that the Applicant provide a full written explanation why, inter alia, she together with the Archivist had breached the Tender Policy by inviting suppliers to attend presentations and asking them for quotations.

84. The Applicant duly submitted her written explanation, detailing the events that occurred whilst the Legal Advisor was on leave, including the communications she had with the Administration Manager and the Archivist.

85. The LegaJ Advisor was not satisfied with the explanation and she instituted disciplinary charges against the Applicant.

86. Following a disciplinary hearing; the Applicant was found guilty on the following two charges:

CHARGE 1

Gross insubordination in that on or about dates 15th, 17th, and 22nd February 2006 you willfully dis-regarded and acted against your supervisor's (Legal Advisor's) specific instructions and proceeded, solicited and accepted or caused to be solicited and accepted quotations from potential suppliers of filing equipment, and you interviewed the said potential suppliers of filing equipment.

CHARGE 2

Breach/violation of tender policy and regulations in that on or about the dates 15th, 17th and 22nd February 2006 you willfully and without due authority assumed the functions of the Tender Committee, whereupon you invited or allowed to be invited potential suppliers of filing equipment for interviews, and proceeded to receive or allowed to be received quotations for filing equipment, and you conducted interviews of the said potential suppliers. Your above actions were all in violation of the provisions of your employer's Tender Policy and Regulations.

36. The Applicant was dismissed with notice in respect of charge 1 and given a Final Warning on charge 2. These sanctions were upheld on appeal.

ANALYSIS OF THE EVIDENCE

37. The Applicant initially misunderstood the Legal Advisor's instructions on procurement policies. She was put back on track by the Administration Manager. We have already held that no deliberate insubordination was intended when she wrote her memorandum of 20th January 2006.

87. It is common cause that the Archivist initiated the presentations by suppliers. As technical advisor on the project, it was reasonable for him to arrange these presentations so as to familiarize himself with the product

specifications, price and availability. It is common cause that similar presentations had previously been held in respect of other requisitions. The purpose of these presentations was not to solicit tenders or quotations, or to usurp the functions of the Tender Committee.

88. The Archivist obtained the consent of the Administration Manager to the presentations. She was not only the Archivist's departmental head, but the head of department in charge of procurement, so it was entirely appropriate and regular for her to authorize the invitation of suppliers to make presentations. Njabuliso Mavuso confirmed that the preliminary interviewing of suppliers did not violate the Tender Policy.

89. ii:G Applicant testified that the suppliers were invited by the Archivist, and she understood the purpose of the presentation to be to ascertain what filing equipment was available and most suited to the bank's needs. She said the suppliers were asked about their product's specifications and price range, but they were not asked to submit quotations. At the disciplinary hearing, both Muzi Matsebuia and the Archivist testified that no one asked the suppliers to submit tenders or quotations.

90. The Applicant's uncontradicted testimony is that the suppliers sent unsolicited quotations to the Archivist, even though they had not yet reached the tender stage. The Archivist prepared his report without her input and the decision to include the quotations was his alone, as was his recommendation of one of the suppliers.

With reference to charge 1 at the Applicant's disciplinary hearing, there is no evidence that the Applicant *"solicited and accepted or caused to be solicited and accepted quotations from potential suppliers."* The Applicant did interview the potential suppliers, but she did so at the invitation of the Archivist and with the knowledge and authorization of the Administration Manager. It also cannot be ignored that the Acting Legal Advisor attended and participated in the presentations, thereby tacitly authorizing them and the Applicant's participation.

With respect to Charge 2, it is established on the evidence that the preliminary interviewing of suppliers does not violate the Tender Policy and Regulations. The Archivist was wrong to disregard the Administration Manager's stipulation that a procurement officer should attend the interviews, but there is no evidence that this stipulation was ever communicated to the Applicant. Since she neither initiated nor arranged the presentations, she cannot be held responsible for the Archivist's failure

to observe a requirement of which she was not aware. Again, there is no evidence that the Applicant *"received or allowed to be received quotations for filing equipment."*

It is the finding of the court that the Respondent has failed to prove, on a preponderance of probabilities, that the Applicant willfully disregarded or disobeyed the Legal Advisor's instructions. The minuted instructions given her at the meeting of the 19th January 2006 were that she should not obtain quotations from suppliers on behalf of the Legal Services Department, and we are satisfied on the evidence that the Applicant never set out to obtain such quotations, nor did she solicit or accept such quotations.

91. At the meeting of the 19 January, the Legal Advisor directed the Applicant to obtain a copy of the Tender Policy for guidance on procurement procedures. The Applicant falsely claimed at the meeting of the 6th March that she had obtained a document on procurement procedures from the Administration Manager which she followed. This indicates that the Applicant was not averse to telling an untruth to avoid criticism. It does not however prove that she was insubordinate in relation to attending the presentations at the invitation of the Archivist.

92. It is also our finding that the Respondent has failed to prove any breach or violation of the Tender Policy and Regulations.

47. It is not surprising to the court that the Legal Advisor leapt to the wrong conclusion when she returned from leave to find the Applicant's letter of 20th January 2006 and the Archivist ill-conceived report recommending acceptance of a specific supplier's quotation. She was not then aware of the involvement of the Administration Manager and she assumed that the Applicant's previous hostility had developed into outright insubordination. It is surprising to us however that the Legal Advisor did not re-assess the position once she had read the Applicant's explanation and the correspondence that passed between the Legal Services Department, the Administration Manager and the Archivist, and after she had a chance to discuss the matter with Njabuliso Mavuso.

93. In the judgement of the court, the Respondent has failed to prove that the Applicant's services were terminated for a fair reason, and consequently we find that her dismissal was substantively unfair.

94. We have considered the Applicant's criticism of the chairperson of the

disciplinary enquiry, but we are unable to find any reasonable grounds for suspecting him to have been biased. On the occasions he curtailed the Applicant in her testimony or questioning of witnesses, we are of the view that this was motivated by the need to curtail the proceedings within reasonable limits and not due to any lack of impartiality. We find that the Applicant was afforded a proper opportunity to present her case.

95. There is no evidence before the court of any procedural flaws in the appeal process, or that the Respondent failed to follow the recommendation of the appeal chairman.

96. The Respondent has proved that the termination of the Applicant's services was procedurally fair.

52. The Applicant was dismissed with notice pay. She has not given evidence that the Respondent failed to pay her notice pay or her leave pay. Her claims for notice and leave pay have not been proved. She is entitled to payment of severance allowance, and compensation for unfair dismissal.

53. In assessing our award of compensation, we take into account that the Applicant was employed by the Respondent for a relatively short period of about two and half years. We also take into account that the Applicant to a large extent perpetuated the poor relationship she had with her supervisor and that her own conduct contributed to the misunderstandings that gave rise to the disciplinary charges against her. Nevertheless the termination of the Applicant's services was unfair, and she was unemployed for about eleven months. Her current remuneration is reduced when taking into account the benefits and allowances she enjoyed whilst employed by the Respondent. Moreover she is presently on contract terms with the Swaziland Government and she has lost the security of tenure she enjoyed at Swazi Bank. The court considers that an award of 6 months salary is reasonable in all the circumstances.

54. Judgement is entered against the Respondent for payment to the Applicant as follows:

Severance allowance

E12 804-12

Compensation E84 507-24

TOTAL **E97 311-36**

The Respondent is to pay the Applicant's costs. The members agree.

R. DUNSEITH PRESIDENT OF THE INDUSTRIAL COURT