



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 320/07

In the matter between:

PATRICK THEMBA SUKATI

Applicant

And

**PRINCIPAL SECRETARY
MINISTRY OF EDUCATION**

1st Respondent

**PRINCIPAL SECRETARY
PUBLIC SERVICE & INFORMATION**

2nd Respondent

THE CIVIL SERVICE COMMISSION

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation: *Patrick Themba Sukati v Principal Secretary Ministry of Education & three others (320/07 [2012] SZIC 9 APRIL 2012)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard: 21 MARCH 2012

Delivered: 30 APRIL 2012

Summary:

Unfair dismissal of employee- the employer bears the burden of proof that the dismissal of the employee was both substantively and procedurally fair and was permitted by section 36 of the Employment Act of 1980.

Employer failing to lead evidence before the Court to prove the charges of misconduct preferred against the employee- Court accordingly finds that the employee's dismissal was both substantively and procedurally unfair.

Internal disciplinary hearing- the Industrial Court does not sit as a Court of appeal for internal disciplinary hearings. The Industrial Court makes its own enquiry and makes its own finding based on the facts before it.

JUDGMENT 30.04.12

1. This is an application for determination of an unresolved dispute brought in terms of the **Industrial Relations Act, 2000**. The certificate of unresolved dispute is attached to the application and marked Annexure "A"
2. The Applicant is an adult male Swazi of Ngwenya Village and a former Inspector of Primary Schools and was employed by the Swaziland Government. He was dismissed by the employer on 27th October 2005 after he was found guilty on four charges before the Civil Service Commission, formerly known as the Civil Service Board. He appealed against this decision but no appeal hearing was held.

3. The Applicant reported a dispute with the Conciliation, Mediation and Arbitration Commission (“CMAC”). The dispute was not resolved hence the present application before the court.

4. The Applicant pleaded as follows in his papers:

“9. The Applicant alleges that the termination of his services was unfair and violated the well established principles of natural justice.

10. The Applicant alleges further that the 1st and 3rd Respondent failed to comply with laid down procedures and regulations for conducting a disciplinary hearing such that he was not afforded an opportunity to state his case.

11. During the disciplinary hearing the Applicant was not given enough time to prepare his defence and further call potential witnesses.

12. A representative from the office of the 1st Respondent kept pressing the Applicant to plead guilty to all the charges and further ask for forgiveness from the Civil Service Commission.

13. The Deputy Chairman of the Civil Service Commission kept intimidating the Applicant saying that they will call the police to arrest him if he did not plead guilty to the charge of publishing a malicious article with a local newspaper, the Times of Swaziland.

14. On the 27th December 2006, the Applicant lodged an appeal with 3rd Respondent.

15. Till todate the 3rd Respondent has not honoured the Applicant with a response.”

5. Before the court the evidence of the Applicant was not successfully challenged by the Respondents during cross examination. The Applicant told the court that he was first employed by the Swaziland Government as a Teacher in 1985. In 1988 he was promoted to be a Lecturer at Mlalatini. In 1991 he was appointed to be Inspector of Primary Schools. His immediate supervisor was the Regional Education Officer (“REO”) for Hhohho Region, Mr. Henry Khumalo. He said he did not have a good working relationship with the REO and he felt like an outcast as the REO would sometimes call Inspectors to a meeting and excluded him. He told the court that even the Principal Secretary (“PS”) was also biased against him. The Applicant said he once applied for a transfer and variation but was not successful. He also applied for a car loan and was also not successful.
6. The Applicant was called to appear before the CSC and was facing four charges. He said he was not served with the charges prior to attending the disciplinary hearing. He said the charges that he was facing before the CSC were slightly different from the ones that were preferred against him at the departmental hearing. He said there was no order or procedure at the hearing before the CSC as every one would talk whenever they felt like. He was found guilty and was dismissed. He said after he was dismissed he filed an appeal against the dismissal but no appeal hearing was held.

7. On behalf of the Respondents three witnesses testified. RW1, Jabulani Goodman Kunene told the court that he is the former Principal Secretary in the Ministry of Education. He told the court that the Applicant was dismissed for poor work performance and misconduct. He said all procedures were followed before the Applicant was dismissed. During cross examination he admitted that he was not present during the disciplinary hearing against the Applicant before the CSC. RW2, Sibongile Mavis Mntshali – Dlamini’s evidence was brief. She had just come to tell the court that the Applicant’s position has since been filled. RW2 is the Director of Education.
8. RW3, John Ndlangamandla told the court that he was the Secretary of the Civil Service Board when the disciplinary hearing of the Applicant took place. He said he is presently holding the position of Under Secretary in the Ministry of Housing and Urban Development. He said it was him who signed the letter of dismissal of the Applicant. He said the Board got a report from the Principal Secretary that the Applicant had committed acts of misconduct. RW3 said he did not recall all that took place during the Applicant’s disciplinary hearing. He denied that there was a member of the Board that threatened the Applicant with arrest. He said there was no appeal hearing because the Applicant had taken the matter to court.

9. Analysis of Evidence:-

The Applicant's evidence was largely un rebutted during cross examination. There was also no evidence led on behalf of the Respondents to prove the charges that were preferred against the Applicant. The Applicant was facing four charges. The charges appeared as follows:

“Charge I

That Patrick Themba Sukati (hereinafter called the accused officer) is guilty of the offence of dishonesty :

- (1) In that on or about the 15 September 2000 he did wrongfully, unlawfully and with intent to deceive issue an operational permit to the Directors of Swaziland National Computer College.**
- (2) In that on or about the 29 September 2000 he did wrongfully, unlawfully and with intent to deceive write to the Head Teacher of Zwide Primary School to effect the replacement of a sick teacher.**
- (3) In that on or about the 15 September 2000 he did wrongfully, unlawfully and with intent to deceive use the letterheads and office stamp of the Hhohho Regional Education Office.**
- (4) In that on or about the 29 September 2000 he did wrongfully, unlawfully, and with intent to deceive use the letterheads and office stamp of the Hhohho Regional Education Office.**

Charge 2

- (1) In that on or about 4 December 2000 he neglected, failed and/or refused to conduct elections of the school committee at St Amideus Primary School when so assigned by his Supervisor, the Hhohho Regional Education Officer.
- (2) In that on or about 23 July 2003 he neglected, failed and/or refused to perform his duties as Inspector since he had stopped inspecting schools of the Hhohho region.
- (3) In that on or about 11 September 2003 he neglected, failed and/or refused to report to his supervisor, the Hhohho Regional Education Officer following instructions to do so when he reported for work in the morning and when he left for home in the afternoon.

Charge 3

- (1) In that on or about 29 September 2000 he did without lawful authority write to the Head teacher of Zwide Primary School to effect a replacement of a sick teacher knowing that the appointment and posting of teachers is the responsibility of the Teaching Service Commission.
- (2) In that during Term 2 and 3 of the 2003 School year he neglected, failed and/or refused, despite requests and/or reminders, to submit his inspection reports to his supervisor, the Hhohho Regional Education Officer.

Charge 4

In that during November 2003 he did without lawful authority release false information to a reporter of the

**Times of Swaziland, which was subsequently published
in the newspaper on the 4 November 2003.”**

10. The charges on count 1 and count 2 (1) were allegedly committed in 2000. They were brought against the Applicant almost four years later. This conduct by the employer tends to confirm the Applicant's evidence that there was bad blood between him and the REO. It shows clearly that the employer was just bent on findings anything that it might use to haul the Applicant to a disciplinary hearing and to get an excuse to dismiss him.
11. In all the charges that the Applicant was facing, he had a good and plausible explanation before the Court. His evidence was not successfully challenged during cross examination. The Respondents did not lead any evidence to contradict the evidence led by the Applicant. For example: Charge 1 (1) it was alleged that the Applicant wrongfully, unlawfully and with intent to deceive issued an operational permit to the Directors of Swaziland National Computer College. The Applicant told the court that it was normal and part of the duties of inspectors to issue the operational permits. There was no evidence led before the court to show that what the Applicant had told the Court was not correct. Neither the former Principal Secretary, RW1, nor the Director of Education, RW2, addressed themselves on the charges that the Applicant faced on the basis of which he was found guilty and dismissed by the employer.

12. The Applicant's immediate supervisor, the REO Mr. Henry Khumalo did not testify before the court. The evidence revealed that when the Applicant was employed, the REO at that time was the late Mr. Paul Nhlengethwa. Mr. Khumalo became the REO in 1997 when the late Mr. Nhlengethwa retired. The Applicant having been charged with offences that were allegedly committed in 2000 and 2003, it is clear that even if Mr. Henry Khumalo was called to court as a witness, he was not going to be of any assistance to the court as his evidence would be hearsay. RW3 told the court that Mr. Henry Khumalo testified during the disciplinary hearing of the Applicant. The Industrial Court however does not sit as a court of appeal or review of internal disciplinary hearings. It conducts its own enquiry on the allegations and makes its own findings of fact.

See: **Central Bank of Swaziland v. Memory Matiwane case No.**

110/93 ICA).

Swaziland United Bakeries v. Armstrong Dlamini, case No.

117/1994 (ICA).

Mshayeli Sibiyi v. Cargo Carriers (PTY) Limited, case No.

282/2003 (IC).

13. The onus of proof that the termination of the Applicant was one permitted by **Section 36** of the Industrial Relations Act No. 1 of 2000 ("The Act") was on the Respondents. The Respondents having failed to lead evidence before the court to prove on a balance of probabilities that the Applicant did commit

the offences with which he was charged, it cannot be said that the Respondents have discharged this burden before the court.

- 14.** The evidence also revealed that the Applicant was not served with a copy of the charges prior to the disciplinary hearing. RW3 told the court that the Applicant already knew what the charges were. RW3 admitted during cross examination that the charges were not exactly the same as the ones that the Applicant faced during the internal departmental investigation. It is now trite that the employer should advise the accused employee of the precise charge or charges that he is going to face in advance of the disciplinary hearing. The accused employee has a right to know in good time the exact charges that he has to answer so that he can prepare himself for the disciplinary hearing. RW3 during cross examination told the court that the Applicant was served with the charges by the Head of Department. This was clearly inadmissible hearsay evidence. The CSC did not confirm with the Applicant's Head of Department if indeed he had been served with the charges prior to the day of hearing, nor was the said Head of Department called to lead evidence that the Applicant was indeed served with the charges prior to the hearing.
- 15.** The Applicant also told the court there was no procedure adopted during the hearing. He said any member would ask any question that they wanted to ask. He said the officials from the Ministry of Education that were present at the hearing also joined in the fray. These officials were Mr.

Elliot Sibiya, Mr. Henry Khumalo (the REO) and Mr. Nhlanhla Thwala. During cross examination RW3 confirmed the Applicant's evidence that there was no order during the disciplinary hearing. He said there was no initiator, everyone that was present spoke to the Applicant. RW3 also admitted during cross examination that they did not advise the Applicant of his right to appeal. Indeed the letter of dismissal, page 4 of Bundle "A" does not advise the Applicant of the right to appeal.

16. There is therefore no doubt to the court that the rights of the Applicant to fair disciplinary procedure were not observed. It therefore follows that even procedurally, the dismissal of the Applicant was unfair.
17. The Respondents having failed to lead evidence before the court to prove, on a balance of probabilities, that the Applicant committed the offences with which he was charged, the court will come to the conclusion that the dismissal of the Applicant was substantively and procedurally unfair.
18. **Relief:-**

The Applicant has asked the court for an order for re-instatement, and also for backpay from 27th October 2005 to date of judgement. There was evidence led before the court by RW2 that the position of the Applicant has since been filled. If the court finds that the dismissal of the Applicant was unfair the court has a discretion to make an order for re- instatement, re-engagement or payment of compensation.

See: **Section 16 (1) of the Industrial Relations Act No.1
of 2000.**

19. The evidence that the Applicant's position has been filled was not contradicted by the Applicant. It is therefore now not reasonably practicable for the employer to re-instate the Applicant.

See: **Section 16 (2) (c) (supra).**

20. The court's only remaining option is to make an order for compensation for the unfair dismissal. There was no evidence before the court as to how much the Applicant was earning at the time of his dismissal. It is however a notorious fact that all civil servants are paid a specific amount of money as salary at the end of each and every month. The failure of the Applicant to lead evidence as to the specific amount of salary per month is therefore not fatal as such could be easily ascertainable for his salary advice slip.
21. From the evidence before the court it transpired that the Applicant was dismissed because he had lost favour in the eyes of Mr. Henry Khumalo the REO. The Applicant was first employed by Swaziland Government in 1985 as a school teacher. He had therefore served the Government for about twenty years when he was dismissed in July 2005. He has a clean record of employment with the Government. According to his staff performance appraisal report on pages 3-6 of Bundle "A" the Applicant was a committed officer who was dedicated to his work. It was therefore

clearly grossly unfair to the Applicant to be dismissed in the manner that he was in light of this evidence that he was a dedicated servant of the crown.

22. Taking into account all these factors the court will make the following order:

a) **The 1st 2nd and 3rd Respondents are jointly and severally ordered to pay an amount equal to 12 months' salary to the Applicant as compensation for the unfair dismissal. Each Respondent paying the others to be absolved.**

b) **The 1st 2nd and 3rd Respondents are also jointly and severally ordered to pay the costs of suit. Each Respondent paying the others to be absolved.**

23. The members agree.

NKONYANE J

**For Applicant : H. Mkhabela
Mkhwanazi Attorneys**

**For Respondents : V. Manana and F. Magagula
Attorney-General's chambers**