



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 496/09

In the matter between:

THULISILE MNGOMEZULU

Applicant

And

SWAZILAND FRUIT CANNERS (PTY) LTD

Respondent

Neutral citation: *Thulisile Mngomezulu v Swaziland Fruit Canners (Pty) Ltd (496 [2013] SZIC 10 (March 2013)*

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

Heard : 12 November 2012

Judgment delivered: 19 March 2013

Summary:

Applicant (a former employee of the Respondent) was dismissed by the Respondent whilst under probation without a hearing after the Respondent had discovered that she left her previous employer when there were pending disciplinary charges against her involving fraudulent transactions.

Held—A contract of service is not a contract uberrimae fidei and the non-disclosure of material facts is not a ground for its termination. No obligation exists on an applicant for a position to disclose past misconduct if he is not specifically asked to do so.

**JUDGMENT
19.03.13**

[1] This is an application for determination of an unresolved dispute between the Applicant and the Respondent.

[2] The Applicant is a former employee of the Respondent and was employed by the Respondent as a Payroll Controller on 06th April 2009. She commenced her duties on 04th May 2009. In terms of the written offer of employment, she was to serve three months probationary period. She was however terminated on 04th June 2009 before she had finished the probationary period.

- [3] The reasons for her dismissal during the probationary period appear on Annexure “**TM**” of the application as being that; she failed to disclose the circumstances surrounding the termination of her previous employment, and also that the position of Payroll Controller required absolute trust and integrity.
- [4] The Applicant was not happy with her termination and she reported a dispute to the Conciliation, Mediation and Arbitration Commission (“CMAC”). The dispute could not be resolved at CMAC and a certificate of unresolved dispute was accordingly issued by the CMAC Commissioner. The certificate is annexed to the Applicant’s application and is marked “**TM5**”.
- [5] The facts of this case are largely not in dispute. The Applicant was employed by means of a written contract on 06th April 2009 as a Payroll Controller. Her salary per year was E288,000.00 She was to work from 08:00 a.m. to 17:00 p.m. from Monday to Friday. She was to serve three months’ probation before confirmation. She commenced actual employment on 04th May 2009. She was dismissed by the Respondent on 04th June 2009. No disciplinary hearing was held prior to her dismissal. The Applicant was dismissed by the Respondent after the Respondent got information that the Applicant left her previous employment at Mananga

College whilst she was under suspension pending disciplinary hearing on a charge of dishonesty involving misappropriation of funds and fraudulent transactions.

[6] The question for the court to decide therefore is whether the dismissal of the Applicant in these circumstances was substantively and procedurally fair. Substantively, the question is whether the dismissal was for a reason permitted by **Section 36 of the Employment Act, 1980**. Procedurally, the question is whether a fair pre-dismissal process was followed by the Respondent before it dismissed the Applicant.

[7] **Applicant's Arguments :**

The Applicant argued that:

*7.1 Her dismissal was unfair because it was not one permitted by **Section 36 of the Employment Act**.*

7.2 The dismissal was unfair because it related to circumstances or events that happened during her previous employment.

7.3 An employment contract is not a contract uberimae fidei.

7.4 *There was no duty on Applicant to disclose a previous misdemeanor. The dismissal was therefore unreasonable in the circumstances of this case.*

7.5 *The Respondent failed to discharge the onus that rests on it in terms of **Section 42 of the Employment Act.***

[8] **Respondent's Arguments :**

On behalf of the Respondent it was argued that:-

8.1 *During her interview on 30th April 2009 by RW1, Buyelele Dlamini and RW2, Richard Philips, when the Applicant was asked why she left Mananga College, the Applicant said it was for domestic reasons in that she wanted to stay with her family at Ezulwini.*

8.2 *The Applicant misled the Respondent and exhibited a high degree of deceit.*

8.3 *The Applicant's dismissal was fair because she was given an opportunity to explain her reasons for leaving the previous*

employer, accordingly, she was given the right to be heard before her services were terminated.

8.4 *The termination of the Applicant's services was fair and reasonable in all the circumstances in terms of **Section 36 (b) of the Employment Act.***

[9] **Analysis of the Evidence and the law Applicable:-**

The evidence before the court revealed that the Applicant underwent two interviews. During the first interview she was never asked the reason for leaving her previous employment. After the first interview the Applicant was offered the position and she accepted it. She actually started to work for the Respondent on 04th May 2009. During the second interview therefore, she was already an employee of the Respondent. According to her, the second interview was merely to find out how she was settling in, in her new job and to find out what she needed to enable her to efficiently discharge her duties. She agreed that during this meeting, the Managing Director RW2 asked her why she left Mananga College. She said she was surprised by this question as it was not asked during the first interview.

- [10] During the same day of the second meeting the Applicant was called by the Managing Director at about 2:30 p.m. The Managing Director gave her the letter of termination. Before she was given this letter, there was no disciplinary hearing held prior to the dismissal.
- [11] The disciplinary hearing of the Applicant by her former employer was held in her absence as she tendered her resignation after having been served with invitation to attend the disciplinary hearing. She was found guilty and dismissed by letter dated 06th July 2009.
- [12] The Managing Director of the Respondent told the court that he got information that the Applicant was being investigated by her former employer. He said he made enquiries from the Applicant's previous employer, Mananga College. He said the former employer did not divulge much information as it was in the middle of the investigations. RW2, told the court that he decided to terminate the Applicant because of the information that he got that the Applicant committed fraudulent acts at Mananga College, she was therefore not fit to work in the payroll department because the payroll department requires someone who has integrity and is trustworthy.

[13] The question that arises is whether there was any duty on the part of the Applicant to tell the Respondent that she left her previous employer under a cloud and was under suspension. The learned author **John Grogan: Workplace Law , 8th edition at page 60** dealing with this subject stated as follows;

“ With regard to misconduct committed before the formation of the contract- for example, the commission of a serious crime – the general principle is that there is no duty on prospective employees to disclose prejudicial information from their past to their future employers unless they are specifically asked to do so.”

The position of the law therefore is that, generally, there is no duty on the part of the prospective employee to disclose past misconduct unless specifically asked to do so. In the present case the Applicant was not asked to disclose any past misconduct, she was only asked why she left her previous employment. The Applicant in her evidence in chief said she did tell RW2 that she was under suspension and that her suspension was a fabrication as she had proof of the things she was accused for. She said after explaining to RW2, she went back to work. She said the meeting was

informal and that the employer just wanted to find out how she was settling in.

- [14] The court was referred to the case of **Swazipharm Wholesalers (Pty) v. Michael Kenneth Ellison case No. 17/95 (ICA)** to support the proposition that there was no duty on the applicant to disclose any previous misdemeanor. The Industrial Court of Appeal after having considered the case of **Hoffman v. Monis Wineries Limited 1948 (2) S.A. 163 (c)** at **page three** pointed out that;

“In particular we agree that a contract of employment is not a contract uberrimae fidei in the sense that it requires a prospective employee to make a complete disclosure of his past and where failure to do so would entitle the employer to rescind any contract entered into.”

- [15] We are in agreement with the above judgment of the Industrial Court of Appeal. The judgment however is stating a general principle of the law. Each case must be judged in terms of its own peculiar facts and circumstances. A duty to disclose may arise where non-disclosure amounts to fraud, for example, where the past misconduct would render the

prospective employee unfit for the employment offered, or where the employer can prove that, but for the employee's failure to disclose, another applicant would have been employed. (See:- **Grogan: Workplace Law, Supra at page 60.**)

[16] In the present case, RW2 told the court that after the Applicant had told him that she left her previous employer whilst she was still under suspension, he carried out his own investigations. RW2 said he got information from the Applicant's previous employer and he then took a business decision to release the Applicant a week later based on the information that he had obtained.

[17] The evidence before the court revealed that the Applicant was terminated by her previous employer, Mananga College on 06th July 2009, See:- Annexure "TM3" Applicant's application.

[18] The Industrial Court makes its own findings on a case before it based on the evidence presented by the parties. RW2 told the court that the position of Payroll Controller requires trust and integrity. This was not denied by the Applicant. The Respondent was also able to bring evidence before the court that showed that the Applicant was not a person of integrity. **Exhibit 1** showed that the Applicant made a withdrawal of her pension money from

the College Provident Fund contributions without the authority or approval of the College. Under paragraph C of the document requiring member's declaration, the Applicant signed and also wrote the name of the month. Under paragraph D being a section for company declaration, the Applicant put down a different signature. She told the court that it was not a signature but an initial, and that it was her who made it. When it was put to her that she wanted to give the impression that two different people signed the withdrawal document, she denied. When asked why she used two different signatures, her answer was that there was no apparent reason.

[19] The court had the opportunity to observe the Applicant during cross examination. She clearly failed to impress the court as an honest witness. She failed to give a reasonable explanation when asked why she used two different signatures on the same document. The court has no hesitation to conclude that she did that in order to deceive and to give the impression that two different people dealt with the withdrawal document. She also did not tell anyone else that she had withdrawn her funds.

[20] During cross examination the Applicant also conceded that honesty and integrity were core to the nature of the job that she was employed to perform.

[21] In the present case, the court comes to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant is not an honest person and that the employment relationship could not reasonably be sustained after the discovery of the Applicant's past misconduct.

[22] The learned author **John Grogan** stated at page sixty one that;

“To justify summary termination after the contract has become operative, misconduct must generally be serious enough to render the employee unfit for employment in the employer’s business or to render the continuation of the employment relationship intolerable”

In the present case the evidence revealed that after the Respondent had discovered the Applicant's past misconduct, RW2 decided to terminate her because the position of Payroll Controller requires trust and integrity. The court therefore comes to the conclusion that the dismissal of the Applicant was substantively fair.

[23] The court will now deal with the question of procedural fairness. On behalf of the Respondent it was argued that there was no duty on the Respondent to give the Applicant a fair hearing before her termination

because she was still under probation. **Section 32 (1) of the Employment Act No.5 of 1980** states that;

“During any period of probationary employment as stipulated either in the form to be given to an employee under Section 22, or in a collective agreement governing his terms and conditions of employment, either party may terminate the contract of employment between them without notice.”

[24] This provision of the law is however contained in a **1980 legislation**, before the coming into effect of the Constitution of the Kingdom of Swaziland in 2005, which is the supreme law of the country. **Section 20 (1) of the Constitution** provides that;

“All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.”(my emphasis)

[25] In her application the Applicant stated in paragraph 12 that;

“Applicant views her dismissal by the Respondent not only to be contrary to the labour laws of the country but also to the spirit of the Constitution of Swaziland, 2005.”

The court has already made a decision on this issue when it delivered its ruling on the point of law raised. The court dismissed the point of law raised that there was no requirement for a fair pre-dismissal procedure because the Applicant was still under probation. The court came to the conclusion that all employees at the workplace should enjoy equal protection of the law against unprocedural dismissals.

[26] The court therefore comes to the conclusion that the dismissal of the Applicant was procedurally unfair because it was not preceded by a fair pre-dismissal procedure.

[27] An accused employee is entitled to both substantive and procedural fairness.

RELIEF :

[28] The Applicant told the court that she is presently not employed. She survives by doing piece jobs. She said she manages to get E5000.00 – E6000.00 per month. The evidence revealed that she was paid one week's salary in lieu of notice. This payment was in terms of the written contract between the parties. The evidence showed that the Respondent did not act maliciously or negligently when it dismissed the Applicant without adhering to pre-dismissal procedures. It is the court's finding that that the Respondent bona fide, but mistakenly believed that it was entitled to dismiss the Applicant without a fair reason or process simply because she was on probation. The Applicant's life however dramatically changed for the worst within a twinkling of an eye, without any prior notice. The evidence revealed that she was called to the office of the Managing Director at about 2:30p.m and given the letter of termination. She was then told to go and take her belongings from the office and leave the premises. She said she was being escorted by the H.R and Finance Manager. She said all this happened in full view of her colleagues, and she was embarrassed. Taking into account all these factors the court will make an order that the Respondent pays to the Applicant an amount equivalent to one month's salary calculated at her rate of remuneration on the date of dismissal. Having found that the dismissal was unfair only for procedural reasons, we

do not think that it would be fair in the circumstances of this case to burden the Respondent with an order for costs. Accordingly, we order that each party is to pay its own costs.

[29] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: MR. A. LUKHELE
(DUNSEITH ATTORNEYS)

FOR RESPONDENT: MR. M. SIBANDZE
(MUSA M. SIBANDZE ATTORNEYS)