



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 437/2009

In the matter between:

CYPRIAN MKHWANAZI

Applicant

and

MUNICIPAL COUNCIL OF MBABANE

Respondent

Neutral citation: *Cyprian Mkhwanazi v Municipal Council of Mbabane (437/2009)[2018] SZIC 52 (June 19, 2018)*

Coram: N. Nkonyane J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: 31/05/18

Delivered judgement: 19/06/18

SUMMARY---Labour Law---Conflict of interest---Applicant in supervisory position and having 80% shares in a company that was awarded tenders to do work for the Respondent--- Applicant failing to declare his interest ---Applicant claiming that he was not aware of Staff Standing Orders requiring employees to declare their interests---Respondent's employees reminded to declare their interests by the Internal Auditor and Applicant stating false information---Whether declaring false information amounts to declaration at all.

Held---Over and above the requirements of the Respondent's policies requiring declaration of interest there is a general duty on every employee not to enter into an arrangement that creates a conflict between their personal interests and those of their employers.

Held further---A declaration of interest based on false information is no declaration at all.

JUDGEMENT

INTRODUCTION:

1. The Applicant is an adult male of Mbabane. He is a former employee of the Respondent. He was dismissed by the Respondent by letter dated 08th December 2008 after he was found guilty on two counts of misconduct.

2. The Applicant did not accept the dismissal and he reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation, and the Applicant instituted legal proceedings before this Court in terms of **Section 85(2)** of the **Industrial Relations Act No.1 of 2000** as amended as read together with **Rule 7** of the **Industrial Court Rules of 2007** for the determination of the unresolved dispute.

3. It was not in dispute that the Applicant was an employee to whom **Section 35** of the **Employment Act** applied. Accordingly, the burden of proof was on the Respondent to prove that the reason for the termination of the Applicant's services was permitted by **Section 36** of the **Employment Act**, and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant. (**See: Section 42 (2) of the Employment Act No.5 of 1980 as amended**).

4. The evidence before the Court revealed that the Applicant was found guilty on two charges of misconduct, in violation of the Respondent's Staff Standing Orders of 1977. The charges appear in the invitation to attend the disciplinary hearing as follows:-

“Charge 2 You did continue to engage a company to do business with Council (your employer) when you knew very well that you were an interested party and thus contravening Section 46.1 of the Staff Standing Order of 1977 where it reads: at the time of his/ her engagement with Council

and throughout the course of his employment with Council an employee shall divulge to the Chief Executive Officer (CEO) any interest he or she may have in any business transaction or application with which Council is involved. No employee shall directly or indirectly conduct any business with the Council for his benefit. Any contravention of this provision shall constitute corruption, as well as code No.12 Part 11 of the Staff Standing Orders which is the Disciplinary Code and Procedures 1977 where it reads: Undisclosed conflict of interest or other employment for remuneration.

Charge 3 While you continued to engage Cyprus Electrical in doing business with the Council, you were indeed driven by the interest you had in order to gain out of it and that was in violation of Code No.18. Part 11 of the Staff Standing Orders 1977 read together with Section 36 (b) of the Employment Act of 1980 as amended, where it reads : Dishonesty, forgery, bribery, misappropriation, corruption and undue influence or benefit.”

ISSUE FOR DETERMINATION BY THE COURT:

5. The question for the Court to decide is whether or not the Respondent was able to prove on a balance of probabilities that the Applicant did commit the charges levelled against him. If the Court finds that the Respondent was able to discharge the onus of proof resting on it in

terms of **Section 42 (2) of the Employment Act**, the Court will come to the conclusion that the dismissal of the Applicant was for a fair reason and the Applicant's application will be dismissed.

EVIDENCE LED IN COURT:

6. The evidence led before the Court showed that the Applicant was employed by the Respondent as an Electrical Technician in 1998. He was the Supervisor in the Electrical Department. During the year 2002, the Respondent contemplated a restructuring exercise. In anticipation of the exercise and possible retrenchment, the Applicant formed a company by the name of Cyprus Electrical (Pty) Ltd. The restructuring exercise however did not take place. The Applicant's company therefore remained dormant and did not operate. The Applicant told the Court that the company was taken over by his friend by the name of Sikelela Motsa and it began to operate as from 2004 onwards.

7. The shareholders of the company are the Applicant and his wife Nelsiwe Mkhwanazi. The Applicant has 80% shares and his wife has 20% shares. From 2004 up to 2008, this company was awarded tenders to do electrical work for the Respondent. The Applicant did not disclose to the Respondent that he had interest in Cyprus Electrical (PTY) Ltd until this was discovered by the Respondent's internal auditor, Ransford Quaynor, who testified before the Court as RW3. After this information was discovered and staff reminded to comply with the Staff Standing Orders, the Applicant wrote a memorandum to the Respondent's Chief Executive Officer (CEO)

purporting to declare his interest. This document was dated 03rd September 2008, which was a day before he received the charges on 04th September 2008.

8. The Respondent was of the view that the conduct of the Applicant exhibited a conflict of interest and had elements of corruption and dishonesty, and that it was in violation of the Respondent's Staff Standing Orders. The Applicant was called to a disciplinary hearing. He was found guilty and the chairman recommended dismissal. The Respondent adopted the recommendation and the Applicant was dismissed.

9. **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:**

Failure to Declare Interest:

During the submissions, the Applicant's attorney argued that the Applicant should not have been charged with failure to declare his interest in Cyprus Electrical (Pty) Ltd as he had already done so on the previous day before the charges were preferred against him. The declaration appears on page 117 of **Bundle "R"**. It is dated 03rd September 2008 and it is addressed to the Chief Executive Officer (CEO). The Applicant stated the following:-

I Cyprian Mkhwanazi an employee of the Municipal Council of Mbabane, number 5081 I hereby declare that my wife is a 5% shareholder in the business operating as Cyprus Electrical.

However this declaration follows a memorandum written by the Council through the Internal Auditor, telling us to declare our business interests. See the attached copy of the memorandum.

I believed that I have met the operational guidelines for the Council.”

10. According to the Applicant, it was the first time that he learnt about this provision of the Staff Standing Orders after it was brought to his attention by the Internal Auditor. The Respondent disputed this evidence by the Applicant that he was not aware of the provisions of the Respondent’s Staff Standing Orders. RW2, Simon Bhembe, who was the Applicant’s immediate supervisor told the Court in his evidence in chief that every employee that was hired by the Respondent was served with the Staff Standing Orders. During cross examination RW2 also stated that letters of appointment at the Respondent’s establishment are standard and they do state that the employee is hired in terms of the Staff Standing Orders.
11. The Internal Auditor, RW3, Ransford Quaynor, told the Court that during the course of his duties he noticed that an invoice from Cyprus Electrical (Pty) Ltd had a claim number on it. He said he became suspicious and started to investigate as it was not normal that an outsider could know the claim number. As part of his investigations he went to Registrar of Companies where he discovered that shareholders of Cyprus Electrical (Pty) Ltd are the Applicant and his wife, Nelsiwe Mkhwanazi. RW3 interviewed the Applicant and the Applicant told him that he was aware of the Staff Standing Orders and

that he thought it was not important for him to declare his interest because his wife only had 5% shares in the company.

12. From the evidence led before it, the Court will come to the conclusion that the Applicant was aware or could reasonably be expected to have been aware of the Staff Standing Orders and he failed to declare his interest because of the following reasons;

12.1 The Applicant admitted to RW3 that he was aware of the Staff Standing Orders and told him that he did not find it necessary to declare because his wife had only 5% shares in the company.

12.2 The evidence by RW2 that every employee that was hired by the Respondent was served with the Staff Standing Orders was not successfully challenged during cross examination.

12.3 The evidence by RW2 that the letters of appointment at the Respondent's workplace were standard and that they stated that the new employee was being hired in terms of the Staff Standing Orders was also not successfully challenged.

12.4 It was highly unlikely that the Applicant was not aware of the Staff Standing Orders as he was the head of the Electrical Department. It was therefore highly unlikely and is clearly untenable that a person in a supervisory position and with a service record of about ten years could not be aware of the company policies.

12.5 Assuming for a moment in favour of the Applicant that he was not aware of the Staff Standing Orders, after having been reminded by the Internal Auditor to declare, the Applicant failed to make a total or complete disclosure. He only disclosed his wife's interest. Even at that, he made a false disclosure and stated that his wife has 5% shares whereas the evidence before the Court revealed that his wife has 20% shares.

12.6 The Applicant told a lie to the Respondent when he stated that his wife has 5% shares. He made a false declaration. The Applicant also failed to disclose his personal interest of 80% shares in the company. Such distortion of facts did not amount to disclosure at all. The false declaration by the Applicant clearly cannot be regarded as a declaration of interest at all as envisaged by clause 46.01 of the Staff Standing Orders.

13. Dishonesty and Corruption:-

The evidence before the Court revealed that the Respondent had to submit three quotations if there was any electrical work to be done, to the insurers by the name of AON. At AON the Respondent was dealing with RW1, Thabsile Zwane who processed the claims. RW1 told the Court that she dealt with the Applicant who represented the Respondent. She said if the Applicant was not available, she liaised with his supervisor, RW2. RW1 told the Court that the practice of submitting three quotations was no longer followed. When she enquired about this from the Applicant, the Applicant told her that the

- other contractors had lost interest because it cost them a lot of money and time to prepare the quotations and at the end of the day not win the tender. The Applicant was therefore submitting only one quotation to the insurers, that of his company, Cyprus Electrical (Pty) Ltd.
14. The person responsible for submitting the quotations to AON on behalf of the Respondent was the Applicant. Because of the explanation given by the Applicant to RW1, Cyprus Electrical (Pty) Ltd was awarded tenders without competition. Faced with this evidence of direct conflict of interest, the Applicant told the Court that he was no longer the owner of the company and that he gave it to AW2, Sikelela Motsa.
 15. AW2, Sikelela Motsa testified before the Court that he acquired the company from the Applicant in 2004. He told the Court that the change of ownership was effected at SEDCO. During cross examination, AW2 told the Court that he did not pay anything as consideration when he acquired the company from the Applicant. He told the Court that he is the sole signatory for the company. He said the offices of the company are at a certain house in Mfabantfu. He said there were no terms and conditions attached to the acquisition of the company by him.
 16. What transpired from the evidence of the Applicant and AW2 was that the company has no fixed premises. This was also confirmed by RW3 who said during his investigation he was unable to be referred to any fixed structure or premises, and that he was communicating with AW2 through his mobile telephone.

17. The evidence also revealed that when the Internal Auditor first interrogated the Applicant, he denied knowledge of the company. RW3 said it was only during the second interview that the Applicant said his wife has 5% shares in the company.
18. The evidence also revealed that the Applicant was the one who was supervising the work that was carried out by Cyprus Electrical (Pty) Ltd and certifying it for payment. The Applicant did all the processes leading to the eventual paying out for the tendered work well knowing that he was an 80% shareholder in the company and without having declared his interest to the Respondent. There is no doubt to the Court that his conduct amounted to placing his interest above the employer's interest for financial gain thereby abusing his position of trust and acting corruptly. The evidence before the Court revealed that the total amount paid to Cyprus Electrical (Pty) Ltd was E92,150:00
19. The Applicant had a duty to disclose his financial interest in the company that was doing business with the Respondent, his employer. Dealing with this subject, **John Grogan: Workplace Law**, 8th edition at page 56 states the following principle;

“Failure to disclose a financial interest in another company may also constitute a breach of the employee’s obligation to act in good faith towards his or her own employer where the employee stands to gain financially from dealings between the employer and the company in which he or she has an interest.”

The Court aligns itself fully with the above position of the law. There was no evidence before the Court that there was ever any transfer of the 80% shares held by the Applicant in Cyprus Electrical (Pty) Ltd.

20. The Applicant and his witness AW2, were clearly not credible witnesses. Their demeanor in the witness box left the Court with no other impression except that of being witnesses who had come to Court to peddle lies. The Applicant told the Court that he did not benefit anything financially because the company was being run by AW2. He tried very hard to hide the fact that he never ceased to be a shareholder in the company. That was a proposition whose untenability was clearly demonstrated before the Court as there was no evidence of transfer of his shares. His evidence was rambling and disjointed. It was full of exaggeration and imaginative concoction. For the Applicant to persist in denying that he had no financial interest in Cyprus Electrical (Pty) Ltd even in the light of clear evidence of his 80% shares and that of his wife's 20% clearly showed that he was an unrepentant liar.
21. To the contrary, the Respondent's witnesses were honest and credit worthy. They were prepared to make concessions that were negative to the Respondent's case and did not try to embellish their evidence. Their demeanor in the witness box was impressive and they did not change their evidence during intense cross examination by the Applicant's attorney.

22. From all the evidence led before the Court, there is no doubt to the Court that the dismissal of the Applicant was justifiable.

23. **Procedural Unfairness:-**

In its application the Applicant stated in paragraph 10 that the Respondent flouted the Staff Standing Orders and the Disciplinary Code and Procedure of 1977 by not appointing line managers to deal with the disciplinary hearing. In his written submissions in paragraph 37, the Applicant stated that there was a breach of Article 2.07 of the Disciplinary Code which provides that it is the duty of every manager to consult with the Human Resources Director when contemplating formal disciplinary action. It was submitted on behalf of the Applicant that there was no evidence that the Applicant's Manager, RW2, consulted with the Human Resources Director.

24. It was also argued on behalf of the Applicant that there was a breach of the Code in that the Human Resources Director did not sit in the disciplinary hearing. It was further argued that there was a breach of Article 3.03 (c) (IV) which provides that the accused employee may cross examine witnesses called by Management. It was argued further that the notice to attend the disciplinary hearing did not notify the Applicant in writing of his right to cross examine witnesses called by Management.

25. The evidence before the Court however showed that the Respondent's Human Resources Director, Thembi Dlamini was present in all the hearing dates. **(See: Minutes in Bundle "R")**. There is therefore no

- merit in the Applicants argument that there was a breach of the Code because the Human Resources Director did sit in the disciplinary hearing of the Applicant.
26. As regards the Applicant's right to cross examine witnesses called by Management, the evidence revealed that the Applicant was represented by Welcome Dlamini. The record of the disciplinary hearing as contained in **Bundle "R"** shows clearly that the Applicant's representative did cross examine the witnesses that were led by the Respondent. Even if the Notice to attend the disciplinary hearing did not specifically inform the Applicant of this right, he did however exercise that right through his representative who was afforded the opportunity to cross examine the witnesses paraded by the Respondent. The failure to mention this right in the notice to attend the disciplinary hearing did not therefore constituted a violation of the Applicant's procedural rights as he did exercise that right anyway during the hearing.
27. It was argued that the dismissal of the Applicant was procedurally unfair because the Respondent breach the code by not appointing the line Manager to deal with the disciplinary hearing. The code is not cast in stone. Where necessary, departure is allowed depending on the circumstances of each particular case. The argument by the Applicant was not clear when he said that there was a breach of the code "by not appointing line manager to deal with the disciplinary hearing". The line Manager, RW2, was appointed to deal with the disciplinary hearing. He was the initiator. It would clearly not have been proper

for RW2 to preside over the disciplinary hearing as the Internal Auditor reported the findings to him, he was therefore *au fait* or privy with the facts of the case. The Court is therefore unable to come to the conclusion that the Management acted unlawfully when it exercised its discretion to appoint an outsider to chair the disciplinary hearing.

28. It was also argued on behalf of the Applicant that there was an irregularity because the line Manager RW2, did not consult with the Human Resources Manager. There was no evidence before the Court however that the failure to consult the Human Resources Director occasioned the Applicant any prejudice to the extent that the Court may come to the conclusion that the disciplinary hearing process was vitiated. There was nothing from the evidence before the Court that suggested that the Applicant did not have a fair trial when he appeared before the disciplinary hearing panel.

29. CONCLUSION:-

Taking into account all the evidence led before the Court, the submissions by the parties, the legal principles applicable and also all the circumstances of this case, the Court will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the termination of the Applicant's service was for a fair reason, and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant. The Court will therefore make the following order;

- a) *The Applicant's application is dismissed.*
- b) *There is no order as to costs.*

30. The members agree.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

APPEARANCES:

For Applicant : *Mr. M. Mkhwanazi*
(Attorney at Mkhwanazi Attorneys)

For Respondent: *Mr. S.K. Dlamini*
(Attorney at Magagula & Hlophe Attorneys)