



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 365/2007

In the matter between:-

OSWALD ZWANE

Applicant

And

TIBIYO TAKANGWANE

Respondent

Neutral citation:

Oswald Zwane vs Tibiyo TakaNgwane (365/2007) [2019]
SZIC 36 (2019)

Coram:

D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Last Called:

9th April 2019

Delivered:

15th April 2019

Summary: 1. Dishonesty

Employee committed dishonesty in the course of duty.

Held: Dishonesty betrays the trust relationship between employer and employee. An employer cannot be expected to retain in its business an employee who has committed a dishonest act.

Held further: Dishonesty is a ground for dismissal. It is fair for employer to dismiss an employee who has committed a dishonest act.

JUDGMENT

1. The Respondent is Tibiyo Takangwane a firm that operates business – as such, in Eswatini, with power to sue and be sued. In addition to other business components, the Respondent operated a bursary or scholarship programme for needy students both at school and tertiary level.
2. The Applicant, Mr Oswald Mduduzi Zwane is a former employee of the Respondent. The Applicant was employed on the 19th January 2001. The Applicant served as Creditors Clerk. The Applicant's duties included the following –
 - 2.1 to facilitate payments of monies due to creditors of the Respondent, as well as compile the necessary documents to support the payment, and

- 2.2 to record, in a delivery book, cheques that had been issued by the Respondent as financial aid to the students who are in the Respondent's scholarship programme, and the Respondent added that he assumed this particular duty in the year 2004 – after the restructuring exercise at the Respondent's establishment, and
- 2.3 to keep custody of the cheques that had been issued to the students until the payee – student collects his/ her cheque,
- 2.4 to ensure that each student who collects his/her cheque is identified by way of an identity document before a cheque is released to the concerned student, and
- 2.5 to ensure that a student who has no identity document is identified by Public Affairs department of the Respondent as payee, before a cheque is released to him/her, and
- 2.6 where a student has no identity document, to accompany that student to the bank and confirm, before the bank officers, that the student who has been given possession of the cheque is the payee and should therefore be paid, and
- 2.7 on instruction by an officer in the Public Affairs department, to prepare cheques for students together with a covering letter (or cheque letter), and

to follow the procedural steps to get the said cheques and documents signed by the relevant authorities at the Respondent's establishment.

3. About the year 2006, a certain student, named Mr Bheki Shabangu, who was a beneficiary in the scholarship programme, came to the Respondent's offices to collect his cheque. An officer in the Respondent's Public Affairs department named Ms Busi Shongwe confirmed (from reading her records), that a cheque had indeed been issued in favour of the said Mr Bheki Shabangu.

A search was conducted but the cheque could not be located. The said Ms Shongwe noticed certain disturbing facts concerning the said cheque –

- 3.1 that the missing cheque had been recorded in the delivery book in order to be collected by the payee,
- 3.2 that the cheque had actually been uplifted from the delivery book, and that there was a signature appended in the space provided for whoever collected the cheque,
- 3.3 the signature of whoever signed the delivery book, (next to where the said cheque is recorded), was different from the signature of the said Mr Bheki Shabangu as it appeared from the scholarship forms where he signed in acceptance of the grant.

3.4 the missing cheque number 8870 had been cashed at Standard Bank, Matsapha branch, under circumstances which could not be explained.

4. The aforementioned discovery led the Respondent to institute an audit exercise regarding cheques that it had issued to the scholarship beneficiaries. An internal auditor named Mr Musa Mdluli was commissioned to carry out the audit exercise. The auditor (Mr Mdluli) compiled a written report dated 6th February 2006 which is exhibit R15. In his report the auditor listed 5(five) cheques as having been fraudulently cashed at Standard Bank – Matsapha branch.

4.1 The details of said cheques are listed as follows:

Cheque Date	Payee	Cheque No.	Amount	Cashed
17.1.2005	Bheki Shabangu	008870	E1,770.00	29.4.2005
16.1.2005	Esther G. Magwaza	008618	E7,080.00	14.10.2005
24.1.2005	Thobile K. Dlamini	008941	E12,580.00	20.5.2005
15.6.2005	Celimphele Msibi	008597	E425.00	19.8.2005
Total Value			<u>E21,855.00</u>	

- 4.2 The auditor mentioned further that there was a 5th cheque that had also been fraudulently cashed at the same bank, but the cheque leaf had not

been returned to the Respondent yet. The 5th cheque was drawn in favour of Magongo Setsabile, cheque number 008592, dated 15th June 2005.

4.3 As the investigation continued the Respondent discovered more cheques that had been fraudulently cashed at the bank. The following additional cheques were also mentioned at the trial:

Cheque Date	Payee	Cheque No.	Amount
20.1.2005	Nkosingiphile A Mahlalela	8910	2,655-00
17.1.2005	Sabelo Dube	8877	2,655-00
22.3.2005	Bongani Mabila	8376	2,520-00
28.1.2005	Zamazulu Kheswa	8973	12,080-00

5. Meanwhile on the 26th January 2006 the Applicant was suspended from work to enable investigation to proceed without undue interference. On the 17th February 2006 the Applicant was charged with dishonesty. The initial charge is exhibit R23-24. The Applicant was advised in the summons regarding his right to be represented at the disciplinary hearing and to call witnesses in his defence.
6. On the 22nd February 2006 the Applicant was served with an amended charge sheet which is exhibit R26-28. The amended charge sheet reads thus:

"1. You are charged with the offence of dishonesty in terms of Section 36(b) of the Employment Act No.5 of 1980 in that:

WHEREAS at all relevant times you were employed by Tibiyo Taka Ngwane as Creditor's Clerk, and you were as such entrusted with the custody of cheques that came into your possession on account of Tibiyo Taka Ngwane, which cheques were made out to student beneficiaries under the Tibiyo Scholarship Fund,

You did during the period between March 2005 and December 2005, and at the Matsapha Branch of the Standard Bank (Swaziland) limited, in breach of the trust placed on you by Tibiyo Taka Ngwane, unlawfully and intentionally present the cheques listed below to the said bank for encashment, and did indeed cash the said cheques for your own benefit, thereby causing a loss of E52, 445.00 to Tibiyo Taka Ngwane.

ALTERNATIVELY:

2. That you are guilty of gross negligence in that:

WHEREAS at all relevant times you were employed by Tibiyo Taka Ngwane as Creditor's Clerk, and you were as such entrusted with the custody of cheques that came into your possession on account of Tibiyo Taka Ngwane, which cheques were made out to students who were beneficiaries under the Tibiyo Scholarship Fund,

In breach of your duties as creditor's Clerk, you failed to take the necessary precautions to prevent the theft of cheques which were entrusted to your safekeeping, with the result that at least nine of these cheques (listed below) were stolen and presented for encashment at the Matsapha Branch of the Standard Bank Swaziland, causing a deficiency of E52,445.00 to the funds of Tibiyo Taka Ngwane, and that you further failed to report any of these cheques missing until this was disclosed by an internal audit carried out at the instance of Tibiyo Taka Ngwane."

7. A disciplinary hearing was scheduled for the 28th February 2006. The Applicant attended the hearing without a representative. At the hearing the Applicant was reminded of his right to be represented and to call witnesses. When the Applicant delivered his evidence in Court he was asked regarding the absence of a representative at the hearing and he testified as follows:

"AC Were you represented in the hearing?"

APP No I was not.

AC Why not?

APP Because I told myself that it was something they cooked"

(Record page 7)

According to the Applicant he choose to appear at the disciplinary hearing without a representative.

8. The Applicant pleaded not guilty to both charges. The Applicant was found '*guilty as charged*'. The verdict by the chairman is dated 16th March 2006 – exhibit R36 -42.
9. By letter dated 30th March 2006 the Applicant was dismissed from work with effect from 31st March 2006. The letter of dismissal is marked exhibit R43.
 - 9.1 By letter dated 2nd February 2007 the Applicant appealed against his dismissal. The letter of appeal is exhibit R48. The appeal was received after the Applicant had been granted condonation for late filing of the appeal.
 - 9.2 The appeal was dismissed by letter dated 6th March 2007. The decision of the Managing Director is exhibit R49-50.
 - 9.3 Thereafter the Applicant reported his dismissal to the Conciliation, Mediation and Arbitration Commission for conciliation. The Commission failed to reconcile the parties and issued a certificate to that effect. The matter is before Court for adjudication.

10. The Respondent's 1st witness (RW1) Ms Sonile Dlamini worked as Finance Manager for the Respondent, at the material time. Ms Dlamini was senior to the Applicant. According to Ms Dlamini the Applicant was the custodian of both the supplier cheques and cheques that were issued to the students that had received sponsorship. Ms Dlamini's evidence reads thus:

10.1 *"The applicant would also deliver the cheque letter to the bank if he does not ask the Registry to do that. As Creditors' Clerk he was also the custodian of our supplies cheques and also the student cheques."*

(Underlining added)

(Record page 91)

10.2 *"RW1 When any cheque had received two signatories [signatures] on it, it was his [Applicant's] duty to record the cheques in a delivery book. And then as and when the students came upon production of due identification he would issue the cheque out to the students."*

(Underlining added)

(Record page 92)

10.3 *"RW1 What I see here [exhibit R1 – R4] is copies of the entries in a delivery book. That is the document that would be used to enter the cheques, the cheque number and the students would sign when they received it."*

(Underlining added)

(Record page 92)

10.4 "RC *Was there any other employee, Mrs. Dlamini who was assigned the duty of keeping the cheques and dispatching them at Tibiyo [Respondent]?*

RW1 *That duty was the Applicant's duty. However in instances when he was not there one of the other officers would assist. It was then his duty to make sure that the handover from himself and whoever was standing in for him was done in a proper manner.*"

(Underlining added)

(Record page 92-93)

10.5 "Judge *There were [Were there] other officers who would assist the Applicant in his absence?*

RW1 *Yes Sir.*

Judge *Like which officers. What are the names of those officers?*

RW1 *Matata Gama would assist and so would Benjamin Mdluli.*

RC *Can you tell the Court what were the positions of those officers?*

RW1 Matata Gama was the Accountant. Benjamin Mdluli was the fuel attendant. "

(Underlining added)

(Record page 93)

- 11 The evidence of Ms Dlamini is supported by that of the Respondent's 4th witness Ms Busi Shongwe. Ms Shongwe testified as follows regarding custody of the cheques that had been issued to the students:

"I then told Mr Zwane [Applicant] in the finance department who was custodian of cheques, ... "

(Underlining added)

(Record page 144)

- 12 The Applicant testified as follows regarding custody of the said cheques.

12.1 "AC What were your duties once the cheques were signed?

APP My duties were to put them [cheques] in a container and wait for the students to come and collect the cheques with their ID's [identity documents]. "

(Underlining added)

(Record page 12)

12.2 "AW1 The cheques that were kept by myself were prepared by the Public Affairs Department."

(Underlining added)

(Record page 32)

"RC In that delivery book it's where you listed all the cheques that were to be collected by the students.

AW1 I confirm

(Record page 52)

- 13 The evidence indicates clearly that the Applicant was the custodian of the cheques that were payable to the students. The Applicant kept the cheques in a container and awaited the arrival of each of the student – payee to collect his/her cheque. The Applicant was required to cause each of the students to sign the delivery book when he/she collects the cheque.
- 14 The Applicant mentioned also that his duties required him to attend to board members whose businesses were away from the Respondent's workplace. When he was away, the Applicant left the container – with the cheques inside, in the custody of any of his colleagues. The Applicant's colleagues also had authority to issue out the cheques to the respective payees in the absence of the Applicant. There were 3 (three) colleagues mentioned which assisted the

Applicant in his absence namely: Mr Matata Gama, Mr Benjamin Mdluli and Ms Nomathemba Dube.

- 15 It is common cause that: in his absence the Applicant was assisted by any of his colleagues to dispatch the cheques as aforementioned. The Applicant however has not denied that he had a duty to ensure a proper handover of work from himself to his replacement and vice versa. It was the Applicant's duty (as stated by the Finance Manager), to ensure that all the cheques are accounted for when he returned to his position.
- 16 The Respondent argued further that it was the Applicant's duty to accompany a student, who had been issued a cheque but had no identity document, to the bank, to give the bank officers confirmation that the student concerned was the payee on the cheque and therefore entitled to receive payment.
- 17 Among the students that were beneficiaries in the Respondent's scholarship programme was the said Mr Bheki Samkelo Shabangu. Mr Shabangu was called as Respondent's 3rd witness (RW3). Mr Shabangu testified that in the year 2004 he received a cheque from the Respondent which he had to cash at Standard Bank – Matsapha branch. However Mr Shabangu stated that he could not cash the cheque because he did not have his identity document with

him. The Applicant assisted him to cash his cheque at the bank without an identity document.

17.1 The evidence of Mr Shabangu reads thus when examined in chief:

"The first time if I recall well in 2004 after receiving my allowance cheque for the first time. He [Applicant] offered me a lift from Tibiyo Taka Ngwane to Matsapha. He assisted me to cash cheque. As I indicated to him that I was not ready as I knew that I should have an ID to cash cheque then he [Applicant] offered to assist me to cash the cheque and I accepted that as a kind gesture."

(Record page 140)

17.2 The evidence of Mr Shabangu reads thus under cross examination"

"AC You agree that there was nothing wrong in Applicant assisting you?"

RW3 Yes

AC In fact if he had not assisted you, you would have been delayed in getting your allowance?"

RW3 Yes."

(Record page 142)

- 18 The Applicant did not deny that he assisted Mr Shabangu to cash his cheque at the bank in the absence of an identity document. Furthermore, had the Applicant not assisted Mr Shabangu in the manner he did, Mr Shabangu would not have received payment that day. The Applicant was therefore instrumental in assisting a student who had no identity document to cash his cheque at the bank.
- 19 The Respondent further called Ms Phindile Mlambo as its 5th witness (RW5). Ms Mlambo testified that between the years 2001 to 2006 she worked at Standard bank, Matsapha branch as Teller Supervisor. Her duties included the following-
- 19.1 authorising payment of cheques that had been presented for payment over the counter,
 - 19.2 to supervise tellers and the enquiries department,
 - 19.3 to assist tellers when problems arise regarding balancing of the money in their custody.
- 20 Ms Mlambo added that, at the time material to this case, there were 3 (three) senior officers at Matsapha branch who could authorise payment of cheques, namely: herself, Mrs Magagula and Mrs Ncala. The general rule regarding

payment of cheques was that the student – payee was required to present the cheque together with both his identity document and a cheque –letter which had been issued by the drawer of the cheque. As soon as the supervisor had satisfied herself regarding the requisite documents as well as the availability of funds in the account of the drawer, she would then authorise payment.

21 With corporate clients, such as the Respondent, the bank had established a special relationship which applied a different rule. The special rule was that the Respondent would introduce an authorised agent (chosen from among its employees), who would represent the Respondent at the bank. The duty of the authorised agent, was inter alia –

21.1 to collect bank statements on behalf of the Respondent, and

21.2 to assist students who did not have their identity documents to cash their cheques at the bank.

22 The Applicant was introduced to the bank, as the new authorised agent of the Respondent, by Mr Matata Gama. Mr Gama was the outgoing authorised agent. The bank acknowledged the Applicant as the new representative of the Respondent and began working with him - especially in the area where students needed to cash their cheques without producing their identity

documents. Ms Mlambo added that the appointment of the Applicant as the Respondent's agent was also confirmed by the Respondent by letter which was addressed to the bank.

- 23 When examined in chief by the Respondent's counsel Ms Mlambo testified as follows regarding the Applicant:

"Do you know Oswald Mduduzi Zwane [Applicant]?"

Yes.

How do you know him?

He was introduced to us [Bank] as an authorised agent by Mr Matata Gama from Tibiyo Taka Ngwane [Respondent]. He was taking over from Mr Matata Gama, who had been working on [sic] [in that position] previously.

What were the dealing you were to have? [sic]

He was responsible for cashing cheques from Tibiyo [Respondent].

The students had no identity cards. He was well known to the bank."

(Underlining added)

(Record page 155)

The Applicant did not deny the evidence of Ms Mlambo, especially the role which she alleged the Applicant played at the bank as the Respondent's representative.

24 The Applicant did not deny the allegation that:

24.1 the cheques that are listed in paragraphs 4.1 and 4.3 above were fraudulently cashed at Standard Bank Matsapha, and

24.2 that except for cheque no 8618 issued in favour of Esther Magwaza, payment of the remaining 7 (seven) cheques were authorised by Ms Mlambo.

25 It is common cause therefore that the cheques that are listed in paragraphs 4.1 and 4.3 above were fraudulently cashed at the bank. Each cheque was cashed by a person who was not the payee. According to the Respondent it suffered financial loss as a result of the alleged fraud. The Respondent accused the Applicant of dishonesty in the role he played which led to the fraud aforesaid.

26 The Applicant has denied any wrong doing and pleaded not guilty to the disciplinary charges that appear in the charge sheet. The Applicant's defence is based on 2(two) factors viz –

- 26.1 The Applicant argued that the cheques that were fraudulently encashed were not signed by him; it is not his signature that appears at the back of each of the said cheques and,
- 26.2 The identity number of the person or persons who encashed the said cheques is not written at the back of the cheques, and therefore he could not be associated with that fraudulent act.
- 27 The testimony of Ms Mlambo was that the Applicant was well known at the bank since he was the representative of the Respondent. When she (Ms Mlambo) authorized payment of each of the cheques mentioned in paragraph 24.2 above, she did so because the Applicant was present at the bank on each occasion a cheque was presented, and confirmed that the cheque in question may be cashed. There was also another person who was in the company of the Applicant on each occasion that a cheque was presented for payment, who posed as a student – payee. It was standard procedure for the Applicant to come with a student – payee at the bank in order for the latter to cash his/her cheque. The bank paid each of the said cheques on the strength of the Applicant's confirmation to the bank.

28 Ms Mlambo confirmed that the Applicant did not sign at the back of each of the cheques that were cashed. She added that there was no need to ask the Applicant to sign. The person who posed as the student – payee is the one who signed at the back of each of the cheques when he/she took the money from the bank. An extract of the evidence delivered by Ms Mlambo has explained the position as follows:

“RW5: The procedure was that the person who takes the money signs.

Judge: Who acknowledged receipt?

RW5: The person

JUDGE: When the teller issued cash was Zwane [Applicant] present with the student?

RW5: Yes.”

(Record pages 159 -160).

29 Ms Mlambo delivered persuasive, crucial and uncontroverted evidence before Court which supports the Respondent’s case. The Court finds the following allegations to have been proved:

29.1 When the aforesaid individual cheques were presented at the bank for encashment, the person who posed as a student-payee did not produce his/her identity document to the bank. The impostor was

introduced at the bank by the Applicant (on each occasion), as one of the students who did not have an identity document – and yet entitled to payment – and should therefore be paid without such document. The confirmation that the Applicant gave the bank was sufficient assurance that the person who was accompanied by the Applicant was the student – payee and is therefore entitled to payment.

29.2 The Applicant knew that the person whom he accompanied to the bank for payment, and who posed as a student – payee was not the student - payee and was not therefore entitled to payment. The bank was not alerted to that crucial fact. The dishonesty was in the conduct of the Applicant in knowingly supporting an impostor to pose as a payee at the bank and collect payment to which he/she was not entitled. Clearly the bank was deceived by the Applicant.

29.3 The support that the Applicant gave the impostor caused the bank to waive its rule, in particular the requirement that a payee must produce his/her identity document before he/she could be allowed to cash a cheque. The bank acted in accordance with the special arrangement aforementioned, which they had established with the Respondent as well as the Applicant.

- 29.4 Each of the cheques that Ms Mlambo authorized for payment, she did so on the strength of the confirmation that she received from the Applicant – as a representative of the Respondent. Without the support that the impostor received from the Applicant, that impostor would not have been able to cash any of the cheques that Ms Mlambo authorised for payment. The Applicant therefore played a crucial role in a scheme that led to fraudulent encashment of the Respondent's cheques.
- 29.5 The Applicant's dishonesty was the *sine qua non* of the fraud that was meted out on the Respondent and/or the bank. But for the Respondent's conduct, the fraud would not have occurred.
- 30 The absence of both the Applicant's signature and his identity number at the back of the cheques, does not exculpate the Applicant. The Applicant's signature and identity number were not necessary for the purpose of cashing the said cheques. The said cheques were cashed by way of an agreed special arrangement which the Applicant, Respondent and the bank were familiar with. That special arrangement dispensed with the requirement for the Applicant's signature and/or identity number. The Applicant had used that

special arrangement on numerous occasions and became familiar with its strengths and weaknesses.

31 As part of his argument, the Applicant raised the issue that the Respondent has failed to prove that he (Applicant) was at the bank on the occasion each of the said cheques was presented for payment. Ms Mlambo testified that she had worked hand –in – hand with the Applicant in the period 2004 – 2006. Ms Mlambo and other bank officers became familiar with the Applicant. There was therefore no question of mistaken identity. The Applicant was positively identified by Ms Mlambo as the only officer from the Respondent, who accompanied the impostor to cash each of the cheques referred to in paragraph 24.1 above.

32 The employment relationship is built on trust. Dishonest conduct undermines that trust and consequently justifies the dismissal of an employee who is guilty of dishonesty. An employer cannot be expected to retain in its business an employee who has committed a dishonest act since such an employee is no longer trustworthy. There is ample authority to support that principle.

32.1 *“According to its ordinary meaning, a dishonest act is any act (including an omission) or conduct whose object is to cheat, steal, deceive, defraud and tell lies. From its ordinary meaning the*

conclusion can be drawn that a dishonest act strikes at the very core of trust, which is a sine qua non of the employer – and – employee relationship. A dishonest act may manifest itself in a number of ways e.g by making a false statement or representation”

(Underlining added)

PARKER C: LABOUR LAW IN NAMIBIA 2012, UNAM PRESS, ISBN 978 -99916 – 870 -1- 8 page 53.

- 32.2 “In labour law, the term ‘misconduct’ covers a wide sweep of improper behaviour on the part of the employee, encompassing a range of offences in the employment relationship. The following offences of an employee constitute misconduct at common law: a dishonest act, ...”

(Underlining added)

PARKER C: (Supra) page 52.

- 32.3 “Any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal. Dishonest conduct by definition implies an element of intent. It is necessary, therefore, to demonstrate some deception on the part of the employee which may assume a positive form, for example by making a false statement or representation ...”

(Underlining added)

LE ROUX AND VAN NIEKERK: THE SOUTH AFRICAN LAW
OF UNFAIR DISMISSAL, 1994 Juta, ISBN page 131-132.

- 32.4 *“Dishonesty manifests itself in a number of forms, including providing false information The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment contract, justifying summary dismissal.”*

(Underlining added)

VAN NIEKERK A: UNFAIR DISMISSAL, 4th edition, 2008, Siber Ink, ISBN 978 -1- 920025-24-3 page 53.

- 32.5 The Employment Act no.5/1980 (as amended) provides as follows:
“It shall be fair for an employer to terminate the services of an employee for any of the following reasons –
a) ...
b) because the employee is guilty of a dishonest act ... towards his employer, ..., ”

- 32.6 The dismissal of an employee for misconduct is justified both under the common law and The Employment Act.

33 The Applicant's conduct (aforementioned) was not a mistake. It was a carefully orchestrated scheme with intent to defraud the bank and the Respondent, and which involved active participation of an impostor. The Respondent has proved – dishonesty in the Applicant's conduct. The dismissal of the Applicant on the charge of dishonesty was fair, reasonable and justifiable.

34 Wherefore the Court orders as follows.

The Applicant's claim is dismissed.

Members agreed.



D. MAZIBUKO

INDUSTRIAL COURT JUDGE

Applicant's attorney

Mr A Lukhele and later

Ms K. Ndlangamandla

Respondent's attorney

Mr K. Simelane

Of Henwood & Co.