



**IN THE INDUSTRIAL COURT**

**OF ESWATINI**

**CASE NO. 320/14**

In the matter between:-

**NOMCEBO MABUZA**

Applicant

AND

**SWAZILAND GOVERNMENT**

Respondent

**Neutral citation:** *Nomcebo Mabuza vs Swaziland Government 320/2014*  
 [2019] SZIC 05 (07 February, 2019)

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

Heard submissions: 12/12/18

Judgement delivered: 07/02/19

*SUMMARY---* Labour Law---Applicant being a civil servant undertaking full time studies at Uneswa without the employer's authorization---Applicant charged with absenteeism---Applicant

*found guilty and dismissed by the employer---Applicant claiming that her dismissal was substantively and procedurally unfair.*

*Held---There was no evidence that the Applicant was granted the authority to be away from work to go and pursue the full-time course at the University of ESwatini by the Principal Secretary in the Ministry of Public Service and Information as envisaged by the General Orders. Dismissal of the Applicant was therefore not unlawful.*

## **JUDGEMENT**

1. This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of Section 85 (2) of the Industrial Relations Act 2000 as amended as read together with Rule 7 of the Industrial Court Rules, 2007.
2. The Applicant is a former employee of the Respondent. She was employed in August 2003 in the position of Typist 1 and posted at Hhhukwini Inkhundla. The Applicant was dismissed by the Respondent in March 2014 pursuant to a disciplinary hearing.

3. The Applicant did not accept the Respondent's decision to dismiss her and she reported the matter to the Conciliation, Mediation and Arbitration Commission ("CMAC") as a dispute. The dispute could not be resolved by conciliation and a certificate of unresolved dispute was issued by the Commission. Thereafter, the Applicant instituted the present application before the Court.
4. The Applicant's dismissal was pursuant to a finding of guilty by the Civil Service Commission ("CSC") wherein she was facing two disciplinary charges. In count one, the Applicant was facing the charge of contravening General Order A371 of the Government General Orders of 1973, it being alleged that she wrongfully and unlawfully nominated herself to go on study leave with pay at the University of Swaziland. In count two, she was facing the charge of contravening Regulation A100 (4) of the Swaziland Government General Orders of 1973 as read with Section 36 (F) of the **Employment Act of 1980**, it being alleged that upon or about August 2010 up to the date of the charges in 2014, she wrongfully and unlawfully absented herself from lawful duty without excuse.
5. It was common cause from the evidence led before the Court that the Applicant at some point whilst still in the employ of the Respondent, she

left her duty station and went to pursue academic studies at the University of Swaziland.

6. The questions for the Court to decide therefore are whether or not the Applicant did comply with General Order A371 of the Government General Orders of 1973 in relation to nomination of civil servants for study leave, secondly; whether or not the Applicant was granted authority by the Respondent to be away from duty in order for her to pursue her academic studies at the University of Swaziland.
7. As can be expected, the evidence was largely common cause between the parties. The only point of departure being whether or not the Applicant was granted authority or permission by the employer to be away from work and go to study at the University of Swaziland.
8. The evidence revealed that the Applicant was first employed by the Respondent as a Typist 1. At the time of her dismissal she had climbed the ladder and was holding the position of Personal Secretary stationed at the Ministry of Natural Resources and Energy.
9. The Applicant is now a Bachelor of Laws Degree (LLB) holder. She started her academic pursuit whilst she was still a Typist stationed at

Hhukwini Inkhundla. Her immediate supervisor was the Indvuna Yenkhundla, Titus Mkhabela. She enrolled at the University of Swaziland for a Diploma in Law on a part time basis. She told the Court that she would attend classes on weekends as the diploma course was under the Distant Learning Education Programme. She would apply for leave in order to go and write the examinations.

10. The Applicant passed the diploma programme and had to transfer to the LLB programme. The LLB programme is a full time course. She said her immediate supervisor had no problem with her attending classes and that since there were no classes on Fridays; she would use that opportunity to carry out her duties at work. She also said she would be at work on a full time basis during the vacations.

11. The Applicant was transferred to the Department of Correctional Services. The Department of Correctional Services declined to accept her as she was not going to be available at work on a full time basis because of her academic studies at the University. She was therefore transferred to another Government department, the Department of Fire and Emergency Services which is under the Ministry of Housing and Urban Development. Since the Applicant was then under a new duty station, she had to get permission to attend to her studies from her new

supervisors. The Principal Secretary indeed did write a memorandum directed to his counterpart, the Principal Secretary in the Ministry of Public Service. The memorandum appears on page sixteen of Bundle “A” (The Applicant’s Bundle of Documents marked as Exhibit ‘A’). This document is dated 10 July 2009. In paragraph three thereof the Principal Secretary of the Ministry of Housing and Urban Development stated that;

***“We have no objection in her desire for academic advancement since she is paying for herself.”***

12. There was no response to this memorandum from the Principal Secretary in the Ministry of Public Service.
13. The Applicant was thereafter transferred to the Ministry of Natural Resources and Energy. This was her last duty station in the civil service. It was during her tenure at the Ministry of Natural Resources and Energy that it was discovered that the Applicant went on study leave without proper authorization and received fully salary for three years whilst not rendering any service to the employer. It was also discovered that the Applicant was awarded a pre-service scholarship that is meant for school leavers who are not yet employed by the Government. The evidence

revealed that in total, the Applicant received full salary amounting to E230, 000.00 for the three-year period.

14. An internal or departmental preliminary investigation committee was set up. It was chaired by Mr. Sydney Simelane. The findings of the investigation committee were, *inter alia*, that;

14.1 *The process of obtaining a study leave with pay was not properly done or followed.*

14.2 *There was no authority that was granted to the Applicant to go on study leave with pay.*

14.3 *The Applicant disappeared from work on 10<sup>th</sup> August 2010 to pursue her LLB programme, much against the advice of the Ministry for her to resign first.*

14.4 *Even after her salary was stopped, she did not return to work but only returned after completion of her studies.*

14.5 *There were illegal arrangements between the Applicant and her previous supervisors that led to her getting full pay whilst not on duty pursuing her studies at the university.*

15. The chairman recommended that disciplinary action should be taken against the Applicant. The Applicant was thus served with disciplinary

charges on 19<sup>th</sup> February 2014. The Applicant appeared before the Civil Service Commission (“CSC”). After the hearing the Applicant was found guilty and dismissed with effect from 24<sup>th</sup> March 2014 by letter dated 28<sup>th</sup> March 2014 (See: Page 48 of Exhibit “A”). The Applicant appealed the decision but her appeal was dismissed by the CSC. (See: letter on page 52 of Exhibit “A”).

16. On behalf of the Respondent two witnesses testified being RW1, Busisiwe Gwebu and RW2, Nhlanhla Mnisi. RW1 is currently holding the position of Principal Human Resources Officer in the Ministry of Justice. During the period relevant to the present application, she was working at the Ministry of Natural Resource and Energy as a Senior Personal Secretary for the US Technical. She told the Court that soon after the Applicant arrived at the Ministry, she (Applicant) applied for ten day’s leave. On her return, the Applicant requested to attend her studies at the University. RW1 said the Applicant was asked if she had the authority to go to the University from the Ministry of Public Service. It transpired that the Applicant did not have the authority to pursue her studies at the University. RW1 told the Court that despite the lack of authority, the Applicant however proceeded to pursue her studies at the University.



17. RW1 told the Court that in August 2010, the Ministry of Natural Resources and Energy wrote to the Ministry of Public Service and requested for a replacement of the Applicant. RW1 said the Ministry also caused the Applicant's salary to be frozen. The Applicant did not return to work even after her salary was stopped. She only returned to work upon completion of her studies. The Principal Secretary did not allow her to resume her duties and referred her to the CSC.
18. During cross examination the evidence of RW1 was not successfully challenged and it remained intact.
19. RW2 told the Court that he is the Under Secretary in the Ministry of Public Service. He is in the In-Service Department. He told the Court how the Government system operates regarding the training of civil servants. He also told the Court that in-service training is for people that are already employed by the Government. He said a person that is already employed by the Government is not supposed to benefit from pre-service scholarship, and that an employee cannot nominate himself for training. RW2 also told the Court that the failure of the Ministry of Public Service to respond to the Applicant's letters did not mean that the Ministry of Public Service was approving that the Applicant should proceed on study leave with full pay. He told the Court that the authority

can only be granted by the Principal Secretary in the Ministry of Public Service.

20. Again, the evidence of RW2 like that of RW1 remained largely unchallenged during cross examination.

#### **ANALYSIS OF THE EVIDENCE AND THE LAW:**

21. From the evidence led before the Court, the Respondent was able to establish that it is the Ministry of Public Service that is responsible for the training and to capacitate civil servants. The procedure or process to be followed before a civil servant can go for training was not in dispute. After all the processes, regulations and policies have been complied with, the Principal Secretary of the Ministry of Public Service will then approve the study leave with pay. Whilst the officer is on study leave with pay, the salary of that officer is reduced yearly in a staggered fashion depending on the number of years that the officer will be away from duty. RW2 told the Court that before the officer proceeds on study leave, he or she is required to sign a bonding agreement if the training is for a period of more than six months.

22. There was no evidence before the Court that the Applicant was nominated for training. There was no evidence that she did sign the bonding agreement form. There was also no evidence that the Principal Secretary in the Ministry of Public Service did issue any written authority for the Applicant to go and pursue her studies at the University of Swaziland. RW2 told the Court that the Applicant as a Personal Secretary did not need an LLB degree to enhance her skills because legal qualification is not a requirement for the position of Personal Secretary.

23. From the evidence led before the Court, the Court has no hesitation in reaching the conclusion that the Applicant's conduct was in violation of General Order A371 which provides that;

“A. 371        *(1) If an officer wishes to undertake a course of training or instruction which is primarily in his own interest, and for which he has not been nominated by the Government, he shall be required to do so during a period of vacation leave. Subject to the exigencies of the service, he may be permitted to use any vacation leave standing to his credit. If an officer has insufficient leave standing to his credit to allow him to complete the course, he may, exceptionally, be permitted an additional period of leave without pay; although normally an officer will be expected to*

*resign his appointment, or retire from the Service provided his age so allows, in such circumstances.*

*(2) An application to undertake a course in the terms of this General Order shall be made by an officer through his Head of Department to the Principal Secretary, Ministry of Public Service and Information. Any extension of leave without pay which may be needed shall be subject to the prior approval of, and entirely within the discretion of the Principal Secretary.”*

24. In casu, the course that the Applicant was under taking was primarily in her own interests as it was not a requirement for the position that she was holding. The evidence revealed that the LLB course was a full time programme. The Applicant did not use vocational leave; instead she utilized the working days and continued to draw full salary when she was not rendering any service to the employer.
25. There was no evidence that her supervisor in the Ministry of Natural Resources did nominate the Applicant to pursue the course at the University of Swaziland. The evidence revealed that the Applicant whilst she was at the Department of Fire and Emergency Services managed to convince her supervisors to allow to pursue her academic studies.

26. The evidence however revealed that the Applicant was not paying for herself but she had Government scholarship. RW2 told the Court that it was an anomaly in itself that the Applicant was benefitting from pre-service scholarship when she was already employed by the Government. RW2 told the Court that pre-service scholarship was for candidates who are not yet employed by the Government, like school leavers.
27. The evidence also revealed that the Applicant also did, on her own, apply for study leave with pay whilst she was still with the National Fire and Emergency Services by letter dated 13<sup>th</sup> July 2009. (See: Pages 9 of the Respondent's Bundle of Documents). Despite all the application letters, the Principal Secretary in the Ministry of Public Service did not respond. The Applicant was therefore never granted the authority by the Ministry of Public Service.
28. There was nothing from the evidence before the Court on the basis of which the Applicant could have got the impression that by the failure to respond to the written requests, the Ministry of Public Service was indirectly or by implication, consenting to the Applicant's application. The Applicant's act of writing to the Ministry of Public Service

applying for the study leave with pay was clear indication that knew that she had to first obtain authority from the Ministry of Public Service before she could go on study leave with pay. No such authority was granted by the Ministry.

29. From the evidence led before the Court, there is no doubt that the Applicant was aware that she was required to seek and be granted the authority in order for her to be able to pursue her academic studies. The Applicant's conduct therefore clearly amounted to misconduct. Dealing with the subject of dismissal for misconduct, ***John Grogan: Dismissal, Discrimination and unfair Labour Practices, (2005) at page 216*** stated that ;

*“In labour law, misconduct is said to take place when an employee culpably disregards the rules of the Workplace. These rules may arise either from the express or implied terms of the employee's contract, from general standards accepted as applicable to the workplace, or from express provisions of the employers disciplinary code.”*

30. The Applicant went away from her place of work to pursue her studies without the authority of the Ministry of Public Service. She was absent from work for a period of more than three days. The action of

the Applicant therefore clearly constituted misconduct. In the case of **Classic Number Trading 80 (Pty) Ltd t/a Nashua Tshwane V Ebrahim Shaik –Ahmed & Two others, case number JR 838/13 (LC) (Unreported) Molahleni J** espoused the applicable general principles on this subject as follows at paragraph 21;

*“It is generally accepted that desertion, like absence without authorization, is a form of misconduct which entitles the employer to take disciplinary action of such misconduct”.*

31. Having established that the Applicant did not have authority from the employer, the Court must now consider whether the Applicant provided a satisfactory justification for her absence. In the case of **Impact Ltd (Mondi Packaging SA (Pty) Ltd) V National Bargaining Council for the Wood and Paper Sector & Others, (2013) 34 ILJ 2266 (LC)** at paragraph 21, the Court held that the real issue underlying substantive fairness in cases of this nature was whether the employee had offered satisfactory justification for the extended unauthorized absence.
32. The Applicant’s explanation was that the Respondent was aware that she was at the University of Swaziland and that the Ministry of Public

Service never responded to her letters of request. The explanation tendered by the Applicant had no substance and it was clearly unreasonable. The Court says this because the Applicant did not deny that she was aware of the Government policies regarding study leave with pay. She indeed applied to the Ministry of Public Service to be granted the authority to proceed on study leave with pay. She did not get the authority but she decided to leave her duty station and proceeded to do a full time course at the University of Swaziland.

33. The Applicant argued before the Court that her supervisors at the Hhukwini Inkhundla and at the Department of Fire and Emergency Services allowed her to pursue her studies whilst still employed by the Government. She told the Court that she would come to work on Friday as there were no lectures for law students on Fridays. She also said she would come to work during the break and during the vacations. If the Applicant worked only on Fridays, it means that in a month she would be at work for only four days.

34. The Applicant's argument that she had an arrangement with the Indvuna YeNkhundla at Hhukwini and with Chief Fire Officer is not acceptable as these were illegal arrangements.



35. The Applicant also argued that the employer was aware that she was at the University of Swaziland pursuing her academic studies. Again, this argument does not take the Applicant's case any further. The Applicant was not charged with desertion. She was charged with absenteeism in contravention of Section 36(f) of the Employment Act number 5 of 1980 as amended. That section provides that it shall be fair to terminate the services of an employee if the employee has absented herself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that she was unfit for work on those occasions.

36. The Applicant's explanation for her absence was simply that she was away at the University of Swaziland pursuing her academic studies. As already pointed out in this judgement, the explanation was not satisfactory or reasonable because;

*36.1 The Applicant knew or was aware that as a fulltime employee of the Government, she had to first get permission from the Ministry of Public Service.*

*36.2 The Applicant did write to the Ministry of Public Service seeking authority to proceed on study leave with pay, she did not get that authority, yet she left her duty station and proceeded to the University to carry on with her academic studies.*

*36.3 As a civil servant the Applicant was eligible for short term and long-term in-service training courses. She consciously decided to adopt illegal means to achieve her goal. The only reasonable conclusion that the Court can arrive at is that the Applicant knew that she was not going to be granted the authority because she had been awarded a pre-service scholarship and the only alternative was for her to resign her appointment and she did not want to do that.*

37. Taking into account all the evidence before the Court, the Court will come to the conclusion that the dismissal of the Applicant was substantively fair.

38. The Applicant stated in her application that her dismissal was also procedurally unfair because she was not afforded a fair hearing prior to her dismissal. She stated that she was denied the rights to cross examine witnesses who testified against her and that she was denied the right to a fair appeal. There was no evidence before the Court that supported the

Applicant's allegations. Although there was no record of the disciplinary hearing before the Civil Service Commission that was filed in Court, the letter of appeal against the dismissal was, however, filed in Court. (See: Page 51 of the Applicant's Bundle of Documents). This document showed that the Applicant's appeal was drafted by her current legal representatives, Mkwanzazi Attorneys. In her appeal the Applicant raised only two grounds of appeal. She did not appeal on grounds that she was not granted the right to cross examine witnesses who testified against her. The Court will, therefore, come to the conclusion that it is not correct that the Applicant was denied the right to cross examine witnesses because if this was correct, her attorney would have raised it on appeal.

39. The Applicant also stated that her dismissal was procedurally unfair because she was denied the right to a fair appeal. The Applicant's complaint was that she did not lodge her appeal to a different body but to the same Civil Service Commission that dealt with her disciplinary hearing. It is unfortunate that there is no structure within the Public Service to which appeals from the decision of the Civil Service Commission can be directed. The law currently prevailing is that the Civil Service Commission deals with both the disciplinary hearings and appeals. Dealing with this issue, the Industrial Court of Appeal in the case of the **Attorney General V Thulani Mtsetfwa, case number 09/2018** pointed out in paragraph 16 that;

*“It is therefore clear that in terms of the Constitution, **the Civil Service Commission is also an appellate forum** when it comes to matters of discipline within the Public Service. There is no other structure, except for the Courts, beyond the Civil Service Commission”.*

40. It seems therefore that the Applicant having exercised her right to appeal to the Civil Service Commission, her argument that she was denied the right to a fair appeal cannot be sustained as the Civil Service Commission is the right appellate forum for public sector employees according to the laws of this country.
  
41. The Respondent applied that the Applicant’s application be dismissed with costs. From the evidence presented in Court, it was clear that the Applicant unlawfully benefitted and the expectation is that the Government will require the Applicant to pay back the money. The Court using its discretion will not, therefore, put any further financial burden on the Applicant. Further, the evidence revealed that was negligence on the part of the Government officials who granted the Applicant pre-service scholarship when she was already employed by the Government.



(Attorneys from the Attorney-General's  
Chambers)