

IN THE INDUSTRIAL COURT OF OF ESWATINI

HELD AT MBABANE

Case No. 301/2016

In the matter between:

PERCY THEMBA MAZIYA

Applicant

and

UBOMBO SUGAR LIMITED

Respondent

NEUTRAL CITATION: Percy T. Maziya v Ubombo Sugar Limited
(301/2021) [2021] SZIC 08 (23 November,
2021)

CORAM:

N. NKONYANE, J

(Sitting with Nominated Court Members Mr. S. Mvubu,
and Ms. N. Dlamini)

SUBMISSIONS FILED

16th August 2021

JUDGMENT DELIVERED

19th November 2021

SUMMARY---Labour Law---Applicant, a former employee of the Respondent who was holding the position of Assistant Human Resources Manager was charged with various acts of misconduct involving dishonesty---Evidence led revealed that he committed the misconduct by accepting money and passed on inside information relating to the tender process---Applicant admitting during investigation process that he accepted payments from one of the competitors---Applicant found guilty by the chairperson who recommended the sanction of dismissal---Applicant claiming that the sanction of dismissal was ultra vires the Code because he was a first offender.

Held---The dismissal of the Applicant was substantively and procedurally fair---Dismissal on a charge of dishonesty is in line with the provisions of section 36 (b) of The Employment Act---The Respondent's Code gives the employer a discretion to mete out the sanction of dismissal even to a first offender if the accused employee was found guilty of a serious offence.

JUDGEMENT

INTRODUCTION.

- [1] This is an application for determination of an unresolved dispute between the Applicant and the Respondent that was instituted in terms of Section 85(2) of the Industrial Relations Act No.1 of 2000 as amended.
- [2] The Applicant is an adult male citizen of Eswatini and a former employee of the Respondent. The Respondent is a company that is duly incorporated and registered in accordance with the company laws of the Kingdom of Eswatini having its principal place of business at Big-Bend in the Lubombo Region. The Respondent is a renowned company that is involved in the business of growing sugar cane and production of sugar for household use.

THE DISPUTE.

- [3] The Applicant was employed by the Respondent on the 09th February 1979. He remained in continuous employment until he was dismissed by the Respondent by letter dated the 03rd May 2016. His dismissal was as a result of being found guilty, after a disciplinary hearing, on six charges of misconduct in violation of the Respondent's disciplinary code. He lodged an appeal, but the appeal was not successful. The Applicant did not accept the decision to dismiss him, he therefore reported the matter *to* the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation. The Commission therefore issued a certificate of

unresolved dispute which is annexed to the Applicant's application and marked "PTMI".

THE CHARGES.

- [4] 'the Applicant was facing six charges; namely, **count one:** bribery or corruption (contravention of article 3.3.1 of the Company Disciplinary Code), it being alleged that on or about the period between May 2007 to September 2012 the Applicant received bribes totalling approximately E232, 2000:00 (Two Hundred and Thirty Two Thousand, Two Hundred Emalangi) in exchange -for assisting Quality Catering Services (QCS) in the tender process in breach of the Company's Code of Conduct and Business Ethics, Group Anti-Bribery & Corruption Policy and Code of Coniuct & Business Practices. The payments were for the Applicant's personal gain in exchange for his role in the active promotion for the endorsement of Quality Catering Services during their tender for the rations contract. The Applicant's actions gave QCS an unfair advantage over other companies that were legitimately bidding for the rations tender.

Count two: False evidence (contr1:1vention of article 3.4.2 of the Company Disciplinary Code), it being alleged that the Applicant played a role in the promotion and endorsement of QCS as the preferred rations provider and his selection of QCS as a preferred rations provider for further endorsement by management was misleading.

Count three: Failure to adhere to the Code of Conduct and Business Ethics, the Anti-Bribery & Conuption Procedure and the Company's General Conditions of Service; it being alleged that the Applicant was the custodian of the Company's and Group policies and/or procedures, the Applicant however neglected to abide by these even after he had endorsed his understanding, acceptance that he would adhere to them.

Count four:Dishonesty; it being alleged that the Applicant abused his position and authority by assisting in the appointment of QCS as the supplier of rations in breach of the Company's Code of Conduct and business Ethics Policy, Anti-Bribery & Corruption Policy and Code of Conduct & Business Practices. It was alleged that the Applicant attended meetings at various premises outside the company which were inappropriate and outside the interests of the company, participated and colluded in the planning process prior to the advertising of the tender by the Respondent. It was further alleged that the Applicant allowed his own interest to conflict with those of the Respondent by receiving bribes.

Count five: Disloyalty (contravention of article 3.7of the Company Disciplinary Code), it being alleged that the Applicant failed to make an adequate and full disclosure to the Respondent, of the relationship that had been established between him and Mr. Faizel Ibrahim prior to the appointment of QCS as the Respondents rations supplier. The Applicant's involvement in the promotion for the endorsement of QCS as the preferred rations supplier was disloyal to the company and further contributed to the name of the compari.y being brought into disrepute.

Further, that the Applicant's non-disclosure of his involvement was aimed at bringing the names of the senior management who endorsed the contract following his recommendation into disrepute.

Count six: Misuse of Company Property (Contravention of article 3.2.3c of the Company Disciplinary Code), it being alleged that the Applicant misused Company property including, *inter-alia*, computer systems; breached the Company E-Policy by transmitting Confidential information belonging to the Company to QCS.

The Applicant pleaded not guilty to all the charges.

ISSUES ARISING.

- [5] The crux of the Respondent's case against the Applicant is that he assisted one of the companies that had applied to be a service provider for dry food rations and in that process, breached the Respondent's policies. The issue arising for the Court to decide therefore is whether or not the Applicant's conduct in dealing with one of the competitors in the tender process in the manner that he did, gave it an unfair advantage over the others in such a way that he violated the Respondent's policies. Secondly; whether, from the evidence led before the Court, and also taking into account all the circumstances of the case, the dismissal of the Applicant was substantively and procedurally fair.

THE EVIDENCE LED BEFORE THE COURT.

[6] The Applicant gave evidence before the Comi and closed his case without calling any other witness to testify on his behalf. On behalf of the Respondent, four witnesses testified and a sizeable number of documentary evidence was relied upon.

6.1 The evidence led revealed that the Applicant was employed by the Respondent on the 09th February 1979. The Respondent is a labour-intensive establishment and a big number of the employees receive food rations as part of their terms and conditions of employment. The dry food rations were distributed by the Respondent. At some point the Respondent decided to outsource the work of rations distribution. The Respondent engaged a service provider that it appointed through a tender process.

6.2 The tender process is managed by a tender committee which does the adjudication and shortlisting. The selection of the successful company is done by a committee comprising of the heads of department of the Respondent.

. The successful company is awarded the tender to supply the dry food rations for an agreed fixed period.

6.3 The tender process that led to the dismissal of the Applicant started on the 18th June 2008. The adjudication and shortlisting processes were concluded on the 21st October 2008. The company that was awarded the tender was Quality Catering Services (Pty) Ltd (hereinafter referred to as QCS). The contract term was from the 01st May 2009 for a period of three

years until 31st March 2012 The contract was referred to as a Service Level Agreement.

(See: pages 148-156 of "RI").

6.4 The evidence revealed that the Applicant assisted QCS to win the tender by providing inside information and assistance that led to QCS being the preferred candidate and eventually being awarded the tender. The evidence also showed that the Applicant received money payments from QCS and he arranged a meeting between some union officials with QCS Managing Director Mr. Faizel Ebrahim, thereafter, the union members also received money payments from QCS. The Applicant edited QCS slides or power point presentation that was presented during the adjudication and selection process, thus giving it an unfair advantage over the other competitors.

ANALYSIS OF THE EVIDENCE AND THE LAW.

[7] The Applicant did not deny that he did receive money payments from QCS. His defence was that he did not receive such monies as a bribe in order to support QCS to win the tender. He told the Court that he lawfully received the money as payment for professional consultancy services he rendered to QCS during his spare time. He referred the Court to some invoices that he said he submitted to QCS for payment to him for services rendered. He told the Court that he did not violate any internal policy of the Respondent by rendering professional services to QCS because he had declared his interest as required by the company policies. The Applicant referred the Court to page three of Bundle B, being his letter of declaration of interest which he says was

approved by a former Managing Director of the Respondent, Mr. Guy Williams.

[8] The authenticity of this document was questioned by the Respondent's witness, RWI, Leonard Ndzimandze. RWI told the Court it was not usual that the approval would be done in the manner that it appeared on page three of Bundle B. RWI said usually, the approval would be in writing on a document that has the letter heads of the company.

[9] The Court, on the evidence before it, is unable to make any finding on the authenticity or otherwise of the written approval on this document. In any event, nothing much turns on this aspect because of the findings by the Court on the issue of the payments to the Applicant by Mr. Faizel Ebrahim that follow hereunder in this judgement.

A. PAYMENTS TO THE APPLICANT AND UN10N MEMBERS.

[10] As already pointed out herein, the Applicant did not deny that he received numerous money payments from Mr. Faizel Ebrahim, the Managing Director of QCS before the start of the tender process and after the award of the tender to QCS. His defence was that he got paid that money for consultancy services that he rendered to QCS during his spare time. The Applicant referred the Court to some invoices which he said he presented to QCS for work done as a result of which the payments were made to him. The Applicant however failed to explain all the payments that were made to him. Even those invoices that the Applicant referred to, the signatures thereon

purporting to be that of Mr. Faizel Ebrahim, were found to be fake by the handwriting expert, RW3, Michael John Irving. RW3's evidence was not successfully challenged during cross examination. The Court therefore accepts RW3's evidence. The only reasonable conclusion that the Court can arrive at, therefore, is that those invoices were contrived to justify the payments made to the Applicant by QCS.

[11] There was also evidence that there were some union members that were introduced to Mr. Faizel Ebrahim by the Applicant. They also got regular payments from Mr. Faizel Ebrahim. These union members were Mark Bennett, Bongani Dlamini and Zephaniah Jele. These union members were co-opted and were part of the Tender Committee and participated in the adjudication process. During the investigation, the union members were

interviewed by RW4, Paul Bailey. They admitted that they received the payments from Mr. Faizel Ebrahim as bribes to assist QCS win the tender. The union members, Mr. Zephaniah Jele and Mr. Bongani Dlamini, also signed non-disclosure agreements between them and QCS in terms of which they bound themselves not to reveal to any third party that they were receiving money payments from QCS.

(See: Pages 43 and 44 of "R4").

[12] The Applicant was interviewed by RW2, James Kenny Caldwell. During the interview, the Applicant admitted to having received the payments in order to help QCS to win the tender. The Applicant in Court tried to challenge the admissibility of his admission to RW2. He said RW2 did not warn him and that he was tricked to admit the commission of the offence. RW2 denied that. He told the Court that he was not interviewing the Applicant as an

investigating officer conducting a prosecution investigation, but was merely conducting an internal fact-finding mission following information by a whistle blower.

[13] The interview of the Applicant by RW2 was being recorded. A transcript of the recording was handed to Court as Exhibit U2 of "R2". There is nothing from the transcript that shows that the Applicant was forced or tricked into admitting his dealings with Mr. Faizel Ebrahim. The Applicant was holding a senior position at the Respondent's place. He was, by all standards, an above average employee and member of the society. The Court finds it highly unlikely that he could have been tricked or forced to make an admission of such serious acts of misconduct. From the evidence before the Court, the Applicant made the admission after he realised that RW2 Vyas in possession of some documentary evidence implicating him. The Applicant went on to apologize and asked for leniency from the employer. RW2 gave evidence to the Court and he denied that the Applicant made the admissions under duress. The Court will therefore dismiss the Applicant's defence that he was tricked or forced to make the admissions.

[14] The Applicant referred the Court to an affidavit in support of his defence that he was forced to make the admissions. This document is Exhibit PM23 (Page 56 of "R3"). This document was deposed to at Siteki Police Station on the 20th March 2015. In this affidavit the Applicant says that RW2 enticed him to agree that Mr. Faizel Ebrahim paid him some money. This document does not take the Applicant's case any further, especially because he failed to

explain to the Court why did it take him more than two months to make the affidavit if it is true that he did not voluntarily make the admissions.

B. COMPANYEQUIPMENT.

[15] The evidence also showed that t e Applicant also used the company email facility to do none work related business. This was in violation of the Respondent's E-Policy. The E-Policy is found at pages forty to forty-three of "RI" and under article 4 it is clearly stated that;

"The company offers access to its neti,vork and internet system for business purposes only "

The evidence before the Court revealed that there were numerous emails that were exchanged between the Applicant and Jvfr. Faizel Ebrahim which were not for the work of the Respondent.

[16] From the evidence led before it, the Court finds that it wa proved that;

16.1 Jvfr. Faizel Ebrahim was.the Managing Director of QCS which won the tender to supply dry food rations to the Respondent's employees which business was, prior to that period, being carried out by Fedics.

- 16.2 As early as 22nd May 2007, the Applicant and Mr. Faizel Ebrahim started to communicate by email. In other emails after that one, the Applicant gave inside information to QCS to get ready to compete in the coming 2008 tender for service provider for dry food rations.
- 16.3 The Applicant and the three union members received money payments from QCS in order to help QCS during the tender process.
- 16.4 The Applicant helped QCS by editing the power point presentation that was used during the tender process and the Applicant did not declare his interest when he participated in the work of the Tender Committee.

C. DOCUMENTARY EVIDENCE OF PAYMENTS.

- [17] The evidence before the Comt also revealed that Mr. Faizel Ebrahim was recording the payments to the Applicant and the union members in a document called the black book. The original document was not produced in Court but only certified copies were produced. An issue arose regarding the admissibility of these documents. It was argued on behalf of the Applicant that that evidence was hearsay as the author thereof did not testify in Comt.

- [18] There are, however, exceptions to the rule against hearsay. In the case **of R.V. Miller, 1939 AD 106 at page 9** this question was addressed in the following manner;

"A further objection was taken to these writings on the ground that they are hearsay. But statements made by non witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e., as evidence of the truth of what they assert), they are hearsay, and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness box. If on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the inquiry. "

- [19] The Court is in alignment with the above-stated position of the law. Similarly therefore, *in casu*, these documents are admissible because they constitute circumstantial evidence from which the payments to the Applicant and the union members can be inferred. This evidence, coupled with the admissions of the union members to RW4, Paul Bailey, and also the admission of the Applicant during the interview with RW2, Kenny Caldwell, proves on a preponderance of

probabilities that the Applicant and the union members did receive bribes or corrupt payments from QCS.

D. RESPONDENT'S POLICIES.

[20] From the evidence led before the Court, it became clear that the Applicant had a vested interest in seeing QCS win the tender because of his prior association and dealing with the Managing Director of QCS, Mr. Faizel Ebrahim. Furthermore, the Applicant went ahead and participated in the adjudication process and did not declare his interest to the Tender Committee. This was conduct that was clearly in violation of the principles of corporate governance. When it became clear that the Applicant's conduct was in violation of the company policies, the Applicant argued that some of these policies which he was charged for violating, were at that time not applicable to him because they were not written on Ubombo Sugar Limited letterheads and, therefore, did not form part of his terms and conditions of employment. The Applicant also argued that he signed some of the policies after the tender had been awarded, so he was improperly charged for violating a policy that was not in existence at the time of the tender process. The Applicant in his written submissions (pages 10-11) referred to the Anti Bribery and Corruption Procedure Policy for which he signed the acknowledgement form on the 05th December, 2011.

- [21] The argument by the Applicant relating to lack of the Respondent's letterheads is untenable. The Respondent is a subsidiary of Illovo Group of companies. The evidence by RWL, Leonard Ndzimandze, that the policies were equally applicable to subsidiary companies was not successfully challenged. The second argument by the Applicant that Anti Bribery and Corruption Procedure policy was signed by the Applicant in 2011 is correct as that can be ascertained from page seven of Bundle B. This argument does not, however, take the Applicant's case any further. The Court says this because on count one the Applicant was charged with the violation of two policies, that is, the Group Anti Bribery and Corruption Procedure and also the Code of Conduct and Business Practices. The evidence showed that the Applicant first signed the Code of Conduct and Business Practices policy on the 29th April 2003 (page 214 of R1). This policy was therefore in existence at the commencement of the tender process. Clause 6.1 prohibits the use of company services and equipment (page 105 of R3). Clause 8.3 prohibits acceptance of cash payments (page 106 of R3).
- [22] From the evidence led before the Court, and also taking into account all the circumstances of the case, the Court will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant did commit the offence of dishonesty. The Applicant was a senior employee and therefore had a fiduciary duty towards the Respondent. The Applicant failed to disclose his vested interest when he sat in the Tender Committee. He helped QCS by editing the power point presentation for the tender process and he used the company

properly to exchange emails with J:vlr. Faizel Ebrahiin in contravention of the policies of the Respondent.

- [23] The Court will therefore come to the conclusion that the dismissal of the Applicant was for a fair reason as contemplated by Section 36(b) of the Employment Act No.5 of 1980 as amended.

PROCEDURAL UNFAIRNESS.

- [24] It was argued that the dismissal of the Applicant was procedurally unfair because he was a first offender and did not have a final written warning. It was argued that the chairperson should not have recommended the sanction of dismissal. It was argued that the sanction of dismissal was contrary to the provisions of the Respondent's code.

- [25] This argument is nothing but futile hair-splitting. Reading the code as a whole, it is clear that the chairperson did have a discretion to recommend dismissal even if it was a first violation of the Code as long as he considered the offences committed to be serious. This is contained in article 4.8 of the Code which provides the following;

"4.8 Discharge.

4.8.1 Discharge is the final sanction and should be used:

a) When other forms of disciplinary/corrective action have failed;

or

b) When an employee on a final warning commits an offence

or

c) When the offence committed is of so serious a nature that it amounts to a breach or repudiation of his contractual obligations."

[26] Furthermore, one of the charges that the Applicant faced and was found guilty of, was count four, a charge of dishonesty. The chairperson did not, therefore, misdirect himself when he made the recommendation of dismissal taking into account the provisions of Section 36(b) of the Employment Act No. 5 of 1980 as amended which provides that;

"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 "

[27] It was also argued that the dismissal of the Applicant was procedurally unfair because his post was advertised before the completion of the disciplinary process. This was denied by RW1 who told the Court that the post that was advertised was that of Lindiwe Mbatha, who was also

in the Human Resources Department and had left the Respondent to join Swaziland Beverages. RWI 's evidence was not successfully challenged and will therefore be accepted by the Court as the correct version.

APPLICATION FOR AMENDMENT OF THE PLEADINGS.

[28] Towards the end of the hearing of the evidence, the Applicant applied to amend its application by adding Oswald Magwenzi N.O. as 2nd Respondent and thereby Ubombo Sugar Limited becoming 1st Respondent in these proceedings; secondly, by adding prayer (h) in the reliefs sought to read;

"(h) Reviewing and/or setting aside the 2nd Respondent's -decision of refusal and or deferment of the applicant's application for early retirement.

[29] The application was vigorously opposed by the Respondent.

[30] It was argued on behalf of the Respondent that;

30.1 The issue sought to be introduced at this late stage was not conciliated upon by CMAAC.

30.2 The Applicant is in effect seeking to review a decision of the Respondent which was made about five years ago and that this would be prejudicial to the Respondent.

30.3 The Applicant has failed to follow Rule 53 of the High Court Rule dealing with reviews, the matter is therefore not properly before the Court.

30.4 No explanation has been tendered as to what was the cause of the delay in filing the application for review.

[31] The Court is in agreement with the Respondent's argument that the application to amend will have the effect of introducing an issue that was not conciliated upon at CMAC. For this reason, the application ought to be dismissed.

CONCLUSION.

[32] From the evidence presented in Court, there is no doubt that the charges with which the Applicant was charged were serious and that the chairperson was justified in recommending the sanction of dismissal which was adopted by the employer.

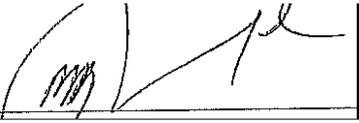
ORDER.

[33] Taking into account all the evidence before the Court, and also all the circumstances of the case, the Court will make the following order;

a) The Applicant's application is dismissed.

b) There is no order as to costs.

[34] The members agree.

A handwritten signature in black ink, appearing to be '-/NKONYANE', is written over a horizontal line. The signature is stylized and somewhat cursive.

-/NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For the Applicant: Mr. S. Madzinane
(Madzinane Attorneys)

For the Respondent: Mr. E. J. Henwood.
(Henwood and Company)