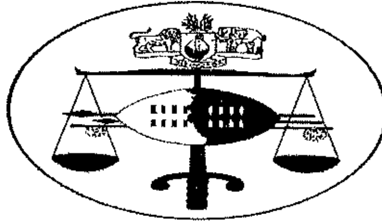

IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 284/2015

In the matter between:

CHARLES CARLOS NKUNA Applicant

And

NKONYENI PRE-CAST (PTY) LTD Respondent

Neutral citation: Charles Carlos Nkuna v Nkonyeni Pre-Cast (Pty) Ltd [2022] SZIC 15 (02 March 2022)

Coram: **S. NSIBANDE J.P.**

(Sitting with M.P. Dlamini and E.L.B.Dlamini Nominated Members of the Court)

Date Delivered: 03 March 2022

JUDGEMENT

[1] The applicant was employed by the respondent as a designer/estimator on the 3rd March 2014. On the 15th April 2015 his services were terminated on the grounds that he had grossly misused company property by watching pornographic material during working hours.

[2] The applicant was dissatisfied with his dismissal and he reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC) in terms of **section 76 of the Industrial Relations Act 2000 (as amended)** Conciliation was unsuccessful and the GMAC issued a certificate of unresolved dispute.

[3] The applicant instituted proceedings in Court claiming maximum compensation for unfair dismissal. He also claimed notice pay, leave pay (12 days) and 5% commission on specific projects he had undertaken.

[4] In his application to Court the applicant alleges that the termination of his employment was procedurally and substantively unfair for the

following reasons;

(a) No evidence or proof was submitted by the Respondent to substantiate the allegations levelled against him and further no witnesses were called by the respondent to prove the allegations.

(b) The Chairman of the hearing failed to apply his mind and take into consideration that applicant had a clean record.

(c) Applicant was suspended without being afforded the opportunity of a pre-hearing meeting which action was wrongful and unlawful.

(d) The termination of the applicant was grossly procedurally wrong in that the prosecutor in the hearing, Mr Van der Westhuizen, also became the Judge and he was the one who effected the dismissal.

(e) The dismissal of the applicant was pre-judged considering the events that happened before the dismissal which was prompted by his refusal to accept the retrenchment which he

· considered to be procedurally unfair and aimed at getting rid of him for no just cause.

(f) The dismissal of the applicant was contrary to **Section 36 (a)** read together with **Section 42 (a) and (b)** of the **Employment Act, 1980.**

Applicant's Evidence

[5] In his evidence, the applicant testified that when he first worked for the respondent he was given a written contract of employment in terms of which he was paid a monthly salary of E8600 and was further entitled to a 5% commission on completed projects.

[6] The applicant's further evidence was that he continued to work without any problems until the company hired a new employee by the name of Carl Strydom. According to the applicant, Carl Strydom started working for the Respondent sometime between December 2014 and January 2015. Carl Strydom, he said, was instructed to be his supervisor and would give him tasks and monitor his progress daily.

[7] According to the applicant, Carl would now and again threaten to give him a written warning if he failed to deliver on the tasks he had been assigned. Carl told him it was his duty to monitor the applicant.

[8] On 19th January 2015, applicant was confronted with a letter terminating his employment. In terms of the letter dated 19th January 2015, the reasons for the termination was the restructuring of the trusses department, leading to his position being declared redundant. In terms of the said letter, applicant's employment was to be terminated with immediate effect and he was to be paid an amount of E40 709.26, being his terminal benefits.

[9] Applicant testified that he refused to sign the letter as he had not agreed with the director of Respondent that his position was redundant. He also felt that the terminal benefits being offered were not sufficient. He was afraid that he would be made to sign the document so he decided to leave the respondent's premises; refused to answer his phone and went home. He then decided to write a letter to the respondent setting out his grievances regarding the manner in which he was being pushed out of his employment with the respondent. He demanded payment of all commission due to him as well as compensation equivalent to three (3) months' salary.

[1OJ Following receipt of this letters the parties agreed that the dismissal/ retrenchment be retracted and that they_ enter into a new contract of employment. This new contract was reduced into writing and the material terms thereof were that the applicant would now receive remuneration of E10 000 (ten thousand Emalangeni) per month instead of E8600 (Eight thousand six hundred Emalangeni) and that there would be no commission payable on completed work. The applicant accepted the new contract of employment and immediately resumed work on 2?1h January 2015.

[11] Apart from the issues applicant had with the said Carl Strydom, he worked under the new contract without incident until the 24th March 2015. On this day he had come early to work and was checking his emails and after which he went into his Facebook account. He claims to have been browsing through his Facebook account when he heard his managing director shouting behind him ***"what are you doing?"*** The managing director was at the window at that time. He then came

through the door, into the office and asked if applicant was watching pornography. Applicant states that he denied this but the Managing

Director took the Computer while stating that he had seen that

applicant had been watching pornography. He then disconnected the computer and took it away to his office.

[12] Applicant was subsequently suspended and advised he would be called for a disciplinary hearing due to having been found watching pornography on a company computer within company working hours. He was called to a hearing on 10th April and the charge was that of gross misuse of company property in that *"on 24th March 2015 you were found watching pornographic material on a company computer during working hours."*

[13] The hearing was held on 10th April 2015 and after hearing the employer and the applicant, the Chairman of the disciplinary hearing found the applicant guilty of gross misuse of company property and recommended that he be dismissed from employment The respondent accepted the verdict and sanction and applicant was, on 15th April 2015 dismissed from the respondent's employ. He was informed that since he had been charged by the highest authority in the company there was therefore no other authority to whom he could appeal. He was advised that he could approach GMAC to

report a

dispute if he was not satisfied with the findings of the disciplinary enquiry. It was the applicant's testimony that he was informed by the chairman of the disciplinary hearing, Mr Maduduza Zwane, of the outcome of the hearing, that he was being dismissed by the respondent. He testified that he was never given a dismissal letter by his employer.

[14] Applicant told the Court that between March 2014 and December 2014, he was the only person using the computer in his office. He said that from January 2015 he shared the computer with Carl Strydom. He denied watching pornography on the 24th March 2015.

Respondents Evidence

[15] The respondent had only one witness, Mr Mauritius Westhuizen. He testified that he had been the Managing Director (MD) of the respondent in 2015, when the incident leading to applicant's dismissal by the respo.ndent took place. He had since left the respondent to run his own business in the farming industry. He left the respondent in 2018.

[16] He testified to knowing the applicant as an estimator and trusses designer, in which capacity he was employed by the respondent. He told the Court that the department dealing in trusses faced challenges to the extent that he sought to restructure it and make it easier to run. When the challenges persisted he sought someone from South Africa who had more experience; to work in that department.

[17] First, he engaged the applicant with what he called a termination contract. When he did so there was no other option open to the applicant other than the termination of his contract. By the termination contract he meant the termination of employment letter to have his employment dated 19th January 2015 informing the applicant that his services were being terminated with immediate effect for reasons of redundancy. The letter further advised applicant of the amount due to him as terminal benefits and had an annexure on which applicant was to sign indicating his acceptance of the termination and his terminal benefits as an agreement in full and final settlement. The letter (and annexure) was accepted into evidence as part of the applicant's testimony.

[18] Mr Westhuizen testified that applicant was upset when he got the termination letter and appeared shocked. He stated that he then reconsidered the redundancy option because of the applicant's reaction. They then discussed the remuneration situation with the applicant and eventually settled on new terms. Applicant agreed to the withdrawal of 5% Commission on profit made on every project completed in exchange (with effect from February 2015) for an increase in his basic salary from E8600 to E10 000 per month. Consequently a new contract of employment was signed on 27th January 2015, capturing the agreed terms.

[19] Mr Wethuizen then went on to tell the Court about the incident of 24th March 2015. He told the Court that he had a question to ask the applicant; that instead of going around the building to go into it in the door he chose to peep through a window. The window gave him direct access to the applicant's computer screen. As he looked in, through the window he saw pornographic material on the applicant's computer screen. He then went around the building so as to enter the office and

. to ask applicant what he was watching. By the time he got to the

applicant's desk the applicant was working on a trusses programme.

Upon checking what other pages were open on the computer he found a page to Facebook. The Facebook page was explicit in nature with a naked woman covered in a red scarf. He then confiscated the computer and immediately suspended the applicant from work pending a disciplinary enquiry.

(20] The applicant was charged with gross misuse of company property in that on 24th March 2015 he was found watching pornographic material on a company computer during working hours. The hearing was held on 10th April 2015 with one Maduduza Zwane chairing same. Mr Westhuizen testified that the applicant had said at the hearing, that he did not know that it was inappropriate to use internet access at that time; that it was wrong for him to be on the internet at that time; and that there were no documents, that said he was not allowed to be on the internet and that he felt he was not doing anything wrong.

[21] Mr Westhuizen handed in the findings of the disciplinary hearing as part of his evidence. The transcript of the hearing was not made available to the Court. _The findings were prepared and signed by the

chairman, Maduduza Zwane who was not called to testify before this Court.

[22] He confirmed that Mr Carl Strydom was employed to supervise the applicant's work daily to enable him to improve his performance since, according to Mr Westhuizen, his performance was not up to par. In his evidence in chief he did not say when Carl Strydom was employed.

[23] With regard to the charge faced by the applicant that of misusing the company computer to watch pornography Mr Westhuizen handed in a document which was admitted as 'exhibit R2." He described it as the summary of the history of the activities of the computer that Mr Nkuna used. He explained that he had anticipated that the applicant would say that he did not have sole access to the computer, so he had sought the computer history from January 2015 when the applicant still had use of the computer by himself. He insisted that the applicant had admitted to him when he was first confronted and at the hearing that he had been watching porn on the 24th March 2015, on the company computer. He stated that he had charged the applicant because it was a serious misconduct when placed against the

company's vision and mission

statement which was to glorify and honour God by being faithful stewards of what He had entrusted to the company.

[24] In cross-examination Mr Westhuizen conceded that apart from the assertion that the applicant admitted to him and at the hearing that he had been watching porn on the 24th March 2015, he had no other evidence that this was so. This was because the history taken from the applicant's computer did not include the 24th March 2015 because it went from 16th to 21st January 2015.

Further when, it was put to him that he had sourced document (R2) - (the history document) - on 22nd January 2015 and that it was on that day that he became aware that the applicant and whoever else used the computer visited porn sites, he admitted that he had become aware of that fact on 22 January 2015. He admitted to having taken no action thereafter until the 24th March 2015 when the applicant was allegedly caught.

ANALYSIS OF FACTS AND LAW

[25] It is not in dispute that the applicant is an employee to whom **Section 35 of the Employment Act 1980** applies. Consequently and in terms

of **Section 42 (2)** of the **Employment Act** his services shall not be considered as having been fairly terminated unless the employer proves that:-

(a) that the reason for the termination was one permitted by **section 36;** and

(b) that taking into account all the circumstances of the case it was reasonable to terminate the service of the applicant.

[26] The respondent submitted that the applicant was fairly dismissed because he abused/misused company property by watching pornography on the company computer on 24th March 2015; that he was not entitled to log on the Facebook; and that the computer and access to the internet were made available to him for the sole purpose of working on trusses designs.

[27] In proof of the allegation that the applicant was watching porn of the 24th March 2015, the respondent filed the history of the sites allegedly surfed by the applicant, extracted from the hard drive of the computer. That history was in written form and the document was accepted as exhibit **'R2'.** A close look at exhibit R2 shows that the

history contained

therein is from 16th January to 21st January 2015. Mr Westhuizen admitted that it was extracted from the computer hard drive on 22nd January 2015. There was no history extracted from the hard drive to support the allegation that on 24th March 2015, the applicant had been watching pornography on the computer. This is despite MrWesthuizen testifying that he had taken away the applicant's hard drive for the purpose of extracting such evidence. He was unable to explain why there was no such history before us. He could only say that he had given his file to the respondent's H.R. Manager when he left the respondent. In the circumstances and, in our view, there is no evidence before Court that the applicant was actually on the internet surfing pornographic sites on 24th March 2015. In the findings of the disciplinary hearing there is no finding that the applicant was abusing the Company computer by watching porn on 24th March 2015. The Chairman's finding were based on the applicant's general admission that the employees did watch porn on the computer and that he was missing the computer by doing so. On the charge of abusing the computer by watching pornographic material on 24th March 2015, no direct evidence of same was led. In the circumstances it is not possible to find on a balance of probability that the applicant was

abusing the

employer's computer by watching pornographic material on 24th March 2015.

[28] In written submissions the respondent suggests that since the applicant admitted to watching porn on the company computer on other days other than the 24th March he had contravened a rule of the respondent and was rightly dismissed.

[29] Quoting **John Grogan. *"Workplace Law."* 7th Edition, Juta and Co at 146,** the respondent's attorney states that:

> *"Any person who is determining whether a dismissal for misconduct is unfair', should consider;*

(a) Whether or not the employee contravened a rule or standard regulating conduct in, or, of relevance to the Workplace;

(b) If a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard

(ii) the employee was aware, or could have reasonably expected to have been aware of the rule or standard

(iii) the rule or standard has been consistently applied by the employer, and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

[30] In coming to conclusion whether or not a dismissal is unfair the Court must also take into consideration the principle laid down in the case of **Central Bank of Swaziland v Memory Matiwane (NULL) [1998] SZ ICA 3 (01 July 1998).** Wherein **Sapire JP** (as he then was) stated the following:

> *"The court* a *quo does not sit* as a *court of appeal to decide whether or not* a *disciplinary hearing came to* a *correct finding on the evidence before it.*
>
> *It is the duty of the Industrial Court to enquire, <u>on the evidence placed</u> before it,* as *to whether the provisions of the Industrial Relations Act and the Employment act have been complied with, and to make* a *fair award having regard to all the circumstances of the case."*

[31] In terms of the evidence led before Court, the Respondent did not have a written policy on the use of the internet. When he was told, in cross examination that the applicant had been unaware of any policy

regarding the use of the internet, Mr Westhuizen's answer was that due to his position the applicant ought to have understood that he was not expected to watch pornography on the work computer, even though there was no specific policy in that regard.

[30] On the evidence led in Court we have no doubt that the applicant was aware or could have been reasonably expected to be aware that it was not proper for him or any of the staff, to watch pornographic material on the respondents computer, especially during working hours. We say this because the applicant testified that he was aware that other companies had a rule against visiting pornographic sites on work computers; that at any time that he was on a site other than one required for work and the managing director approached, he would minimise the site and maximise the trusses site so that the managing director would not see what site he had been on. That is an indicator that he was aware that whatever site he was visiting the internet, it was not proper to do so during working hours and on the work computer.

[31] The question that arises in terms of **Grogan's** expositions, is whether

the rule or standard has been applied consistently by the employer.

On the evidence led before us it can not be said that the employer has been consistent in the application of the rule. On the respondent's own evidence, the managing director Mr Westhuizen became aware that the employees were using the work Computer to visit pornographic sites on 22nd January 2015 and he never took any action against them until the applicant was charged on 24th March 2015. There was no explanation given for this lack of action against employees.

[32] Further it was shown through the history extracted from applicant's computer on 22nd January 2015 that the computer had visited pornographic sites between 16th and 21st January 2015. In our view it can not be deciphered from the history who was actually visiting these sites. This is because at this point, at least, on 20th January 2015 there

is indication that the Gmail box of one Strydom27@gmail.com was accessed. In all likelihood the new employee Carl Strydom would have been the one accessing that Gmail inbox. Mr Westhuizen confirmed that Mr Strydom was hired in January 2015 thus confirming the applicant's evidence that from January 2015 he shared the

computer with Mr Carl Strydom. In our view, it cannot be said that the rule or standard against abuse of the company computer had been applied

consistently by the employer. The employer had been aware of the abuse of the computer for at least two months but took no action, not even to advise employees of the consequences of surfing the internet for pornographic material.

[33] Taking into account the circumstances of this matter and the facts proven before the Court there was no fair reason for the applicant's dismissal. In the view of the Court the applicant's dismissal was substantively unfair.

Procedural unfairness

[34] The applicant submits that his dismissal was procedurally unfair because he was not afforded an opportunity to appeal against the finding of guilty issued by the chairman of the disciplinary enquiry.

[35] It does appear from the findings of the disciplinary hearing that the applicant was not given the opportunity to appeal the chairman's findings. The chairman states in conclusion that *"the employee was*

charged by the highest authority at the NPC and therefore there is *no other authority he can appeal to."*

The employee was then invited to report a dispute at CMAC if he was not satisfied with the chairman's findings.

[36] In submissions the respondent stated that it was the duty of the applicant to lodge an appeal and that his failure to do so cannot be attributable to it.

[37] From the evidence before us it is clear that it was the respondent that advised applicant that there was no forum for an appeal. Mr Westhuizen for the respondent confirmed that the applicant had been advised by the disciplinary hearing chairman to approach CMAC if he was unhappy with the decision to terminate his services. In terms of our law, a fair hearing includes the right to appeal. (See in this regard **Joseph Sangweni v Swaziland Breweries (52/2003) [2006] SZIC 74 (18 August 2006) and Themba Phineas Dlamini v Teaching Service Commission (324/2013) [2013] SZIC 21 (09 July 2013).** While it may well be that the respondent's highest authority had charged the applicant, it is not unreasonable to expect that the respondent could have provided an independent chairman to hear or consider an appeal

by the applicant. Actually the respondent had had an independent chairman hearing the disciplinary enquiry, in any event. Combined with other transgressions that were not denied (e.g. there was no charge sheet prepared and served on the applicant setting out exactly what charge he faced and that there was no letter of dismissal issued by the respondent) it is clear that there was no procedural fairness in the applicant's hearing.

[38] For the reasons set out above, the Court holds that the termination of the applicant's services was substantively and procedurally unfair.

Re: Leave pay

[39] The applicant claims leave pay in the sum of E4615.32 being in respect of 12 days leave. Apart from making a bare denial on the papers, the applicant's claim was not contested by the respondent. In fact it was admitted by the respondent's witness, Mr Westhuizen. Having confirmed that the applicant was entitled to leave after having completed a year of employment. Mr Westhuizen further confirmed

that applicant had not been paid leave. He agreed that applicant was owed his leave days.

In the circumstances we come to the conclusion that the applicant has established his claim for leave.

5% Commission

[40] The applicant further claims an amount of E38 374.00 being in respect of 5% commission on completed works as per his initial contract of employment. In his evidence in chief the applicant stated that the Commission had been earned in 2014 and ought to have been paid to him monthly in 2014. He provided the Court with a Trusses Project Evaluation Sheet and explained that, on the completed projects the respondent had made a profit of E767 486.15 from which he was entitled to 5% as per the agreement of employment that was in place in 2014.

[41] In cross-examination, there was no denial that applicant was owed commission. The only issue that was raised was about a discrepancy in the figures contained in the applicant's documents when compared

with that of the respondent. It was suggested that the document

produced by the respondent had in fact been emailed by applicant to Mr Westhuizen. He testified that the document gave a summary of works that were completed or were in progress during applicant's time at respondent for the year 2014. According to Westhuizen the commission was to be calculated from the profit gained which was E743 395.72 and it became due after the completion of a project. He could not say which projects exhibit on R 1 were not paid. The only issue he raised regarding R1 was that the Kuwait Residence (No.9, 10, 11, &12 on R1) work was never done despite having been quoted. In cross examination this assertion was not challenged by the applicant.

[42] It appears to us th.at on the facts established herein, the applicant is entitled to commission at 5% as per the previous employment agreement regard being had to the fact that the commission was &one in 2014 and is therefore not affected by the contract entered into in January 2015. The respondent confirmed having offered commission of E23 222.40 to the applicant when it offered him the retrenchment package 19th January 2015. The commission offered in the retrenchment package was based on profit of E300 000. No

explanation was given to the Court on how this E300 000 was made up.

[43] On the respondent's own evidence, the commission would be payable from the total on the profit column of exhibit R1 amounting to E743,

395.72. Accepting Mr Westhuizen's unchallenged evidence that the Kuwait residence project never took off, we reduce that total amount by E71726.45 (being the alleged profit from the Kuwait residence project) and the total profit gained would then be E609 346.85. It seems to us that the applicant is entitled to his 5% commission based on this figure.

[44] The applicant did not seek reinstatement. He sought payment of compensation for unfair dismissal, 12 days leave as well as the 5% commission. He also sought his statutory terminal benefits.

[45] At the time that he gave evidence before Court, the applicant was 36 years old. He had not found alternative employment, some five years after dismissal and he indicated that he had a wife and a child as well

as a father who was dependant on him. He stated that he now did

piece jobs, designing trusses but that such jobs were difficult to come by. He earned E10 000 at dismissal.

[46] Having found that the applicant's dismissal was unfair both procedurally and substantively, we order that the respondent pays the applicant the following relief:

46.1 Compensation for unfair dismissal equivalent to 12 (twelve month's salary **E120 000.00**

46.2 Notice Pay - **E 10 000.00**

46.3 Commission at the rate of 5% of E609 346.85 - E 30 467.34

= **E 160 467.34**

46.4 Costs of suit

The Members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. E.B. Olamini (Labour Law Consultant)

For Respondent: Mr V. Dlamini (Currie - Wright Associates)