

IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 35/2017

In the matter between:-

CYRIL KHUMALO

APPLICANT

AND

SWAZILAND RAILWAY

RESPONDENT

Neutral citation : *Cyril Khumalo v Swaziland Railway*
(35/2017) [2022] SZIC 73

CORAM : **DLAMINI J,**
(Sitting with *A.S. Ntiwane & S.P. Mamba*
Nominated Members of the Court)

Last heard : **11 December 2021**

Judgement Delivered : **08 June 2022**

Summary: *Labour law – Unfair Dismissal: Applicant was dismissed without a hearing by the Respondent whilst still serving his probation after he had admitted that he has circulated confidential information using his cellular phone. Held: Even in cases where there is a valid substantive reason for a dismissal, an employer must still follow fair procedure before dismissing an employee. Held Further; Dismissal of the Applicant in casu was procedurally unfair but substantively fair – Applicant awarded 2 moths salary as compensation.*

1. Cyril Khumalo is the Applicant in this matter. He is a former employee of the Respondent, Swaziland (now Eswatini) Railway. He has approached this Court for relief, alleging that his dismissal by the Respondent was unfair, hence his claim for reinstatement or in the alternative compensation. Khumalo was initially employed by the Respondent in August of the year 2015, as a Payroll Administrator. His letter of employment provided that he shall serve a probationary period of 6 months, during which period his performance shall be monitored by his Supervisor. The letter of employment also provided that during the probationary period, either party may terminate the contract of employment within 24 hours. The services of the Applicant were terminated 01 February 2016, just 2 days before he completed his probation.

2. In his testimony under oath, the Applicant informed the Court that he joined the Respondent as a Payroll Administrator on the 3rd day of August 2015, and that the probationary period was 6 months. He further informed the Court that he worked continuously until 02 February 2016, when his services were unfairly terminated. According to the Applicant, the reasons advanced by his employer for the

termination of his services were poor work performance and disclosure of confidential information, which he denies.

3. Further evidence by the Applicant was that his troubles started on 04 December 2015, when he received correspondence from his Supervisor accusing him of poor work performance and disclosure of confidential information. In respect of the disclosure of confidential information, the allegation against him was that he circulated, using his cellular phone, confidential information regarding the payment of a 13th cheque for the year 2015, notwithstanding stern warning from his Supervisor to keep payroll information confidential. Then in respect of the poor work performance, the allegation against the Applicant was that he reported for duty late and that he would return from his lunch hour break way after the prescribed time. Another allegation was that he was incompetent in that he exhibited tendencies of laxity towards his work.
4. The Applicant wrote back to respond to this letter from his Supervisor on 08 December 2015. Firstly, in respect of the allegation disclosure of confidential information he conceded that the 'confidentiality code

of ethics was compromised' and for that he apologized and promised proper adherence to the confidentiality code in future. Then in respect of the lateness accusation, he denied that he reported for duty late and he returned from his lunch hour late. He also disputed that he was not meeting deadlines. He nonetheless promised to promptly meet deadlines on reports expected from him. Finally, in relation to the allegation of incompetence, the Applicant stated that he was still on a learning curve and that he took full responsibility of any errors that may have occurred in the execution of his duties. He further promised to raise his working standards so that they could display competence on his work as was expected of him.

5. However, in his evidence in-chief the Applicant vehemently denied that he circulated confidential information regarding the payment of the 13th cheque. He went on to inform the Court that in his understanding the confidentiality clause was for ensuring that the Respondent's secrets were not revealed to competitors or third parties.
6. The Applicant also disputed that he missed any deadlines, that he was ever late for work or that he would come back late from his lunch

8. The Applicant continued to inform the Court that the allegation that he circulated the confidential information came from his Supervisor's daughter, who was one of the Graduates in Training. When questioned by the Court on why he left out such critical information in his letter of response because it was essentially his defence to the serious allegations against him, and would have exonerated him if indeed he was not involved, he nonchalantly informed the Court that it was a mistake on his part not to include this in his letter. Clearly, this was now an afterthought to now seek to blame his Supervisor's daughter in what he was initially apologetic for.

9. The Applicant maintained his denial that he would report for work late and that he came back from his lunch hour after the expiry of the prescribed one hour. He also denied that he was lax and incompetent in the execution of his duties, stating instead that he was committed to his work. When referred to his letter of response in which he stated that he was still on a '*...learning curve*' and that '*...he took full responsibility for any errors that may have occurred in [my] work...*' and he further promised to raise his working standard; he informed the Court that what he wrote in the letter of response was not true, and that

all what he wrote in the letter was only meant to appease his Supervisor and harmonise the situation as things were getting out of hand. Surprisingly, he then requested the Court to ignore his letter of 08 December, 2015. That, in a nutshell, was the Applicant's case.

10. In support of the Respondent's case, 2 witnesses were paraded. The first witness to be called was Ntfombiyenkhosi Mamba. She introduced herself as the Accounts Payroll Officer. She has been an employee of the Respondent for more than 20 years. Her department is responsible for the processing and payment of salaries, payment of third parties, reconciliations etc.
11. Mamba's further testimony was that the Applicant was employed as a Payroll Administrator but was not confirmed at the end of his probationary period because he was always late for work, failed to meet deadlines, was incompetent and that he breached the Respondent's confidentiality policy.
12. According to Mamba, the key attributes of the Applicant's position of Payroll Administrator were that; he had to supervise and train his

subordinates in specialized payroll practices and procedures, but the Applicant was lacking in this aspect and as such he failed to impart this knowledge to those under him.

13. Then in relation to the accusations of lateness, Mamba informed the Court that the Applicant sometimes reported for work as late as 9 am together with his wife/girlfriend, and would immediately leave only to come back just before the lunch hour or sometimes even after the lunch hour. She says she engaged and warned the Applicant about his late coming to no avail. This, Mamba says, contributed to the payroll department failing to meet deadlines. One such instance in which the Applicant's department failed to meet a deadline was when the Respondent was preparing to pay its employees the cost of living adjustments; the Applicant is said to have been so overwhelmed that his department failed to meet the target date.

14. Then coming to the payment of the 13th cheque issue, Mamba testified that she specifically informed and stressed to the Applicant about the confidentiality of the payment of the 13th cheque because some employees were not eligible to benefit from this payment. She says

thereafter, she was informed by Gugu Matsebula who said that she (Gugu Matsebula) had been approached by some of the employees enquiring about why they had been excluded in the payment of the 13th cheque. These employees said they had been informed by the Applicant that they would not benefit from payment of the 13th cheque. He had apparently shared a screen shot, from his cellphone, of the document excluding them from this benefit. The excluded employees are said to have flooded the human resources office complaining about why they were excluded. And in order to avert a strike action, she says the Respondent was forced to reverse its decision.

15. This witness then referred the Court to clause 7 of the Applicant's contract of employment which provides that; *'...You are not to (either during or after your employment, without the consent of your Employer) divulge any information concerning the Employer about any of its dealings, transactions or affairs, which may come to your knowledge during the course of your employment'*

16. Witness Mamba further testified that she then wrote the 04 December 2015, letter directed to the Applicant in which she raised the issues of confidentiality, lateness and incompetence. He responded to the letter on 08 December, 2015, admitted his guilt on the confidentiality issue, was apologetic and showed some remorse. The Company however wrote back to him on 01 February 2016, advising him that the position of Payroll Administrator required that he exhibits a high level of confidentiality and work ethic, which were lacking in him. As such he was informed that he would not be confirmed to the position. His services were accordingly terminated with effect from the 02nd February 2016.

17. Under cross examination, this witness conceded that no disciplinary hearing was convened against the Applicant to test the veracity of the allegations against him. Interestingly, she informed the Court that there was no need to convene a disciplinary hearing because the Applicant was still on probation.

18. The next witness to testify in support of the Respondent's case was Gugu Matsebula. She is employed as a Human Resources Officer. She

testified that in December 2015, whilst she was the acting Human Resources Manager, she received a complaint from a certain Yakhe Mamba, a Graduate in Training, enquiring why they (the Graduates in Training) were left out in the payment of the 13th cheque/bonus payment. The next day, this Yakhe Mamba showed this witness a screen shot, on his cellphone, of the document which was excluding them from benefitting in the 13th cheque. Upon further investigation it was discovered that the source of the screen shot message which was being circulated was the Applicant. This, she says, was confirmed through his cellphone contact number.

19. In her closing submissions the Applicant's Attorney insisted that the Applicant's dismissal was both procedurally and substantively unfair. On the procedural fairness her main contention was that the Applicant was not afforded an opportunity to defend himself against the allegations levelled at him. She stated as well that his dismissal was without warning. Attorney Ms. Masuku referred the Court to the case of *Mphikeleli Sifani Shongwe v Principal Secretary Ministry of Education (Unreported) IC Case No. 207/2006* in which Dunseith JP stated that '*...an employee who faces dismissal for alleged misconduct*

should be given the opportunity to state his case and answer to the charges against him.' In the *Mphikeleli Shongwe* matter the Court further stated that *'...the requirement of a fair disciplinary hearing is so fundamental in the context of labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable.'*

20. In relation to the alleged incompetence, the Applicant's Counsel submitted that there is no evidence before Court to prove that the Applicant performed his duties poorly, as there were no performance evaluations conducted on the Applicant, nor were any measures taken by the Respondent to remedy whatever short comings the Applicant may have had. Then in respect of the allegation that the Applicant circulated confidential information, his Counsel submitted that since the screen shot was not part of the evidence before Court, then this allegation cannot be said to have been substantiated.
21. On behalf of the Respondent, Attorney Mr. H. Magagula submitted that since the Applicant was still on probation at the time his services were terminated, he was therefore not an employee to whom section

35 of the Employment Act applies, and that therefore there was no obligation on the Respondent to give him a fair hearing before his termination.

22. This issue of relying on section 32 (1) of the Employment was long settled by this Court in the *Mngomezulu v Swaziland Fruit Cannery (Pty) Ltd [2013] SZIC 10* where the Court came to the conclusion that all employees at the workplace should enjoy equal protection of the law against procedural unfairness. This, especially with the advent of section 20 (1) of our Constitution which guarantees equality before the law. The fact that the Applicant was still on probation when his services were terminated does not mean that he could be terminated without fair pre-dismissal hearing. Even in cases where there are valid substantive reasons for a dismissal, an employer must still follow fair procedure before dismissing an employee.

23. As a matter of fact, procedural fairness may in fact be regarded as the 'rights' of the employee in respect of the actual procedure to be followed during the process of discipline. Some of these rights that have to be met include; the right to be informed of the allegations

against him, the right to be allowed reasonable time to prepare a response to the allegations, the right to be given an opportunity to state his case during the disciplinary hearing, the right to put questions to witnesses testifying against him, the right to be represented by a colleague etc.

24. The failure by the Respondent to accord all these rights to the Applicant leads to the inescapable conclusion that his dismissal was procedurally unfair. Indeed it is unacceptable that at this day in contemporary age we could still be having an employer of the stature of the Respondent failing to afford an employee his basic right to be heard.

25. Then in respect of the substantive fairness the Respondent's Counsel submitted that on the whole conspectus of the matter, based on the Applicant's evidence and that of the Respondent's 2 witnesses, the Respondent has discharged its obligation, on a preponderance of probabilities, to prove that the misconduct committed by the Applicant was sufficient to warrant that his services be terminated.

26. As is common cause, the reasons for the dismissal of the Applicant are stated as, mainly, his breach of the confidentiality code, his lateness and incompetence. To start off with and in respect of the confidentiality issue, the Court points out that the relationship of the parties was regulated by a contract, which clearly provided at clause 7 that the Applicant was not, either during his tenure of employment or after his tenure, to divulge any information concerning his Employer about any dealings, transactions or affairs, which may come to his knowledge during the course of his employment. The purpose of this confidentiality clause is to ensure that the employee does not share confidential information with others. This obligation applies both during and after the termination of employment.

27. In respect of the allegation that the Applicant, using his cellphone, circulated confidential information about the payment of the 13th cheque, when he was given the opportunity to respond to this serious allegation, he never disputed that he had circulated such information to other employees. Instead he conceded that he compromised the confidentiality code, and was very apologetic about it. If indeed he had not circulated the confidential information he would have denied

this allegation when questioned about it at the very first opportunity availed to him.

28. Now, to then turn around here in Court and say something that is at a complete variance with what he stated when this issue first arose is an indication that the Applicant is not a truthful witness, and that therefore his evidence cannot be relied on. He even informed the Court that all that he wrote in the letter was not true and was only meant to appease his Supervisor and that the Court should disregard this letter. The fact that the Applicant could nonchalantly inform the Court to disregard a letter he wrote in response to the serious allegations against him, and when the matter was still fresh in his mind, shows that he is not a credible witness. In fact, one should mention that this is one inconsistency and contradiction in the Applicant's case which the Court cannot overlook.

29. The Court therefore comes to the conclusion that the Applicant did circulate the confidential information in total violation of clause 7 of the contract of the parties. For that reason alone, it is therefore a


finding of this Court that the dismissal of the Applicant was for a valid reason and therefore substantively fair.

30. As pointed out earlier in this judgement, the dismissal of the Applicant was procedurally unfair because it was not preceded by a fair pre-dismissal hearing or procedure. A pre-dismissal hearing would have afforded the Applicant an opportunity to state, for instance, why he was disputing the 2 other allegation levelled against him; that being the lateness and incompetence allegations. The employer would have also have presented whatever evidence it had against him. But that was not to be, hence the conclusion that his dismissal was procedurally unfair.

31. The Applicant informed the Court that he wanted to be reinstated to his position, failing which that he be compensated. Reinstatement is unfortunately not possible in the circumstances of this case because the Court has already found that he cannot be trusted with confidential company information.

32. Taking into account all the factors and circumstances of this case, the Court will make an order that the Respondent should pay the Applicant an amount equivalent to two (2) months' salary calculated at the rate of his remuneration at the date of dismissal. There is no order as to costs.

The members agree.


T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 08th DAY OF JUNE 2022.

For the Applicant : *Attorney Ms. M. Masuku (S.M.Jele Attorneys)*
For the Respondent : *Attorney Mr. H. Magagula (Robinson Bertram Attorneys)*