



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 332/2013

In the matter between:-

NOMCEBO MASANGO

APPLICANT

AND

**O.K. BAZAARS (PTY) LTD t/a
SHOPRITE**

RESPONDENT

Neutral citation

*Nomcebo Masango v O.K. Bazaars (Pty) Ltd
t/a Shoprite (332/2013) [2022] SZIC 31*

CORAM

DLAMINIJ,
*(Sitting with A.S. Ntiwane & S.P. Mamba
Nominated Members of the Court)*

Last heard

11 December 2021

Judgement Delivered

29 March 2022

Summary: Labour Jaw- Un/ail' Dismissal: Applicant seen on video footage consuming food in cold room and she was subsequently charged and taken through a disciplinary hearing which culminated in the termination of her services. Totality of the evidence indicating that App/cant was indeed seen in the video footage consuming food without permission and had written a statement in which she confessed to the offence, Held: Dismissal of the Applicant in casu was procedurally and substantively fair - Applicant's application accordingly dismissed.

1. Nomcebo Masango, who is the Applicant in these proceedings, is a former employee of the Respondent, O.K. Bazaars t/a Shoprite. She has approached this Comt for relief, alleging that her dismissal by the Respondent was unfair, hence her claim for compensation and ancillary relief. Masango was initially employed by the Respondent in July of the year 2006, initially as a Cashier and was later transferred to the delicatessen department in the shop. She worked in that department until the beginning of February 2013 when she was dismissed following a disciplinary hearing.
2. Detailing the circumstances that led to her dismissal the Applicant testified under oath that on a certain day around early January 2013, she was summoned by a her branch Manager, Moses Mkhonto, to the butchery section of the shop. There she says she found the branch Manager together with a Mr. Nkosi from South Africa. She was shown a video in which the person in it was seen consuming food belonging to the Respondent. The person in the video was said to be the Applicant, but she says the footage shown was not clear hence she denied that it was herself.

3. She was then made to write a statement explaining what she had observed in the video footage. She says in her initial statement she denied that the person seen in the video footage was herself but she says the branch Manager took that statement and tore it up. He instructed her to write another one confessing that it was her seen in footage consuming the Respondent's food. He threatened to call police if she did not do as directed and she ended up writing a statement in which she confessed to the alleged transgression. In effect she says she was made to write the statement under duress.
4. Thereafter she says she was invited to a disciplinary hearing which was chaired by Ms. Matsibo Mahlalela and the initiator was Mkhonto, the outcome of which was that she was dismissed. She complained that no witnesses were called to testify against her at the hearing and that the footage in question was not re-played as part of evidence against her. She complained as well that after she was found guilty she was not afforded an opportunity to mitigate.
5. Under cross examination by the Respondent's Attorney, the Applicant was referred to page 19 of exhibit document 'Rl '. This is a document

headed 'Mitigating Factors'. When the Respondent's Counsel put it to her that this document was compiled by her she denied this assertion. This, despite that it is clearly signed 'Nomcebo' and that it is written in a hand writing similar to that of the Applicant. The Applicant was also questioned about the document at page 17 of 'R1 '. This document is headed 'Closing Statement'. In it the Applicant just wrote; '*Yentani lenikubonako.* ', which translates to ' ... do as you deem fit'. It is then signed 'Nomcebo Masango.' Again the Applicant denied knowledge of this document, despite that the hand writing is similar to that which is in other documents which the Applicant claimed were written by her.

6. Next, the Applicant was referred to page 13 of 'R1 '. This document is headed '*Internal Voluntary Statement*'. The Applicant confirmed that the statement was written by her. In this statement, the Applicant confesses to having been caught consuming food from the deli department. She details how and why she committed the offence. At the end of the statement she then apologizes and blames evil temptations for committing the transgression.

7. As cross examination continued, the Applicant's testimony made a full 360 degree turn. This was after she had been referred to the Chairperson's findings. She informed the Court that the said Chairperson, Matsibo Mahlalela, never attended her hearing. Instead, she now claimed that there was Mkhonta and some other lady. When the Court referred her to her evidence in-chief in which she informed the Court that the hearing was chaired by same Matsibo Mahlalela, the Applicant maintained that Mahlalela was not in attendance. Clearly, the Applicant was not being truthful. Her Attorney, Mr. C. Bhembe, profusely apologized to the Court, submitting that his client's lies were because she was uneducated and therefore unsophisticated. Despite her Attorney's submissions, the Applicant was unremorseful. She displayed an 'I do not care attitude' to the Court despite being warned that she had perjured herself by willfully making false statements, under oath, during the course of her trial.
8. The Applicant though, it would seem, was unrepented. Her evidence under cross questioning and in-chief continued to contradict. Despite earlier on informing the Court that the statement at pages 13 and 14 of 'RI' was written and compiled by herself, her evidence changed to

now claim that she had been told by Mkhonto what to write in the statement. When she was questioned if she had informed the Chairperson of the disciplinary hearing, she nonchalantly informed the Court that it had slipped her mind to inform her. This, the Court finds to be untrue. If indeed she had been forced to write the statement, this would obviously have been the first thing she should have informed the Chairperson at her hearing. This would have also been the first thing she should have informed this Court. But even here in Court, the Applicant admitted that she is the one who wrote and compiled the statement. One therefore wonders if the Applicant was deliberately being untruthful or whether she has a short memory of what she had previously testified on.

9. The Evidence of the Applicant in-chief and under cross examination is riddled with so many contradictions such that at times when this was brought to her attention she could not explain why she would inform the Court one thing and the next minute she would do a complete turn around on the same evidence. An example of this is the closing statement at page 17 of 'RI' where the Applicant wrote '*Yentani lenikubonako*. 'When the Respondent's Attonery, Mr. Shabangu, again

questioned her about it, without hesitation she informed the Court that she is the one who wrote it, despite that she had earlier on denied knowledge of same. Another example is on the Chairperson of her hearing. When the Respondent's Attorney probed her on her hearing, she confirmed that it was chaired by Matsibo Mahlalela, when at the beginning of her cross examination she had denied that it was. The Applicant also confirmed that she wrote the mitigating statement at page 19 of 'R1', when initially she had denied knowledge of same.

10. Towards the conclusion of her cross examination the Applicant confirmed knowledge of the rule against consuming company stock. Not only that, she also admitted that on some occasions she would consume food from the deli department but this, she said, was with permission when she was doing overtime. When questioned why she did not state this at her hearing and evidence in-chief, she again came up with the excuse that it had slipped her mind. That, in a nutshell, was the Applicant's case.

11. In support of the Respondent's case, Attorney Mr. Shabangu brought in 2 witnesses, Musa Ntshangase and Matsibo Mahlalela. First to

testify was Ntshangase who introduced himself as manager in the fresh food department. He informed the Court that in January 2013 he was shown video footage in which employees of the Respondent from the bakery and deli departments were seen consuming company food without permission. The footage showed the employees consuming the food in the cold room. One of these employees seen in the video footage was the Applicant.

12. The Applicant was called and shown the video footage and she was surprised to see herself in the footage. It was Ntshangase's further testimony that the Applicant was even surprised that there were cameras that captured everything behind the scenes. All the employees were given an opportunity to compile statements explaining the incidents and they did. The Applicant also compiled her own statement in which she admitted to the transgression.

13. Under cross examination, this witness maintained and insisted that it was the Applicant seen in the video footage and that the video was so clear that all the employees involved could be identified, including the Applicant. Ntshangase confirmed that on some occasions, food would

be prepared for the deli employees who were working overtime but pointed out that this was prepared and consumed at the staff canteen. He also maintained and reiterated his evidence in-chief about the Applicant having written the statement in which she admitted and confessed to having unlawfully consumed food without permission.

14. The second and last witness for the Respondent was Matsibo Mahlalela. She was the Chairperson of the Applicant's disciplinary hearing. Mahlalela testified that the Applicant had been shown the video footage and she admitted that it was her on the footage and did not dispute anything. As such, she said there was no need for her to be shown the footage again because she was admitting everything. Mahlalela confirmed as well that the Applicant compiled the statement at pages 13 - 14 of 'R1', in which she admitted that she had consumed the food and that she had no permission to do so. In her closing statement she is said to have informed the Chairperson to do as she deemed fit (*'...yentani lenikubonako*). At the conclusion of her hearing the Applicant was found guilty and dismissed. Under cross questioning this witness maintained her evidence and was unshaken. That was the case for the Respondent.

15. In his closing submissions the Applicant's Attorney insisted that the Applicant's dismissal was both procedurally and substantively unfair. On the procedural fairness his main contention was that the Applicant was not afforded an opportunity to appeal her dismissal. On the other hand, the Respondent's Counsel submitted that the allegation that the Applicant was not afforded her right to appeal is just one of the many untruths being perpetuated by the Applicant in this matter. In this regard Attorney Shabangu referred the Court to document 'RI' which is the Penalty Outcome document of her disciplinary hearing. This document indicates that the Applicant was informed of her sanction and further advised that she may appeal her dismissal to the Regional Manager within 7 days.
16. Thereafter exhibit document '**RI**' indicates that an appeal hearing sitting was convened for 19 March 2013 and **it** was chaired by a Vincent Sihlongonyane, and that the Applicant was in attendance. However, the Applicant requested that the hearing be rescheduled because, according to her, '*...she did not have time for the appeal right now ...* ' and that her lawyer would handle all her cases. The Chairperson advised her that she had to have an internal representative

and further rescheduled her hearing to the next day. On the next day however the evidence before Comt indicates that the Applicant did not show up for her appeal hearing and it proceeded in her absence, with the Chairperson upholding the decision to terminate her services.

17. Clearly therefore, the assertion that the Applicant was never afforded an opportunity to appeal her dismissal is false and is no doubt one of the many untruths the Applicant has consistently peddled in her case before this Court. It is accordingly a finding of this Court that the Applicant was duly afforded the right to appeal her dismissal, and that she exercised it by lodging same only to spurn it when her appeal hearing was rescheduled. She cannot therefore come to this Court to complain that she was not afforded the right to appeal when she was. For that reason, the Court comes to the conclusion and finding that the dismissal of the Applicant was procedurally fair.

18. Then in respect of the substantive fairness the Applicant's case before Court was to deny that she committed the transgression she is alleged to have committed. Her representative submitted that because the alleged video in which was said to have been seen consuming the food

was not played in Comi, it cannot be said that the Respondent has proved that her dismissal was substantively fair. On the other hand, the Respondent's Counsel submitted and argued that it was established at the disciplinary enquiry that the Applicant breached company rules relating to dishonesty by consuming food items belonging to the company without authority and did not pay for same.

19. The Court though points out that having had regard to the totality of the evidence, whatever conclusions it reaches, it has to take into account all evidence that is entailing in this matter. Some evidence might be found to be false, some might be found to be unreliable but at the end of the day all of it has to be taken into account in arriving at a just and fair decision.
20. To state off, the Comi will refer to ***National Employers' General Insurance v Jagers 1984 SA (4) 437 at 440 D-G*** where Eksteen AJP had this to say;

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil

case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. "

21. As alluded to earlier on in this judgement, the case of the Applicant is riddled with so many inconsistencies and contradictions such that the Comi is satisfied, on a balance of probabilities, that her version is not true and accurate and therefore unacceptable. The Applicant herself was not a credible witnesses. She was at times evasive and obviously untruthful and not f01ihright in her responses under cross examination. On the other hand, the Respondent's witnesses were more credible and fo1ihright in their evidence. It is accordingly a finding of this

Court that it is the version of the Respondent that is more probable and reliable and therefore acceptable.

22. Having weighed up and tested the Applicant's version against the general probabilities, the Court comes to the conclusion that it was fair and reasonable to terminate the services of the Applicant.
21. In conclusion therefore, it is a finding of this Court that the Respondent in this matter, OK Bazaars (Pty) Ltd t/a Shoprite, has proved that the dismissal of the Applicant, Nomcebo Masango, was initiated following fair procedures. Not only that, it is also a finding of this Court that the Respondent in this matter has proved that the probabilities of Nomcebo Masango being guilty are greater than the probability that she is not guilty. Hence the finding of the Court as well that the dismissal of the Applicant was also substantively fair.
22. In view of the foregoing the Court accordingly makes orders as follows;
 - a) **The claims of the Applicant against the Respondent be and are hereby dismissed.**

b) The Court makes no order as to costs.

The members agree.



T. A. DLAMINI

JUDG, - INDUSTRIAL COURT

**DELIVERED IN OPEN COURT ON THIS 28th DAY OF MARCH
2022.**

*For the Applicant
For the Respondent*

*Attorney Mr. C Bhembe (Bhembe Nyoni Attorneys)
Attorney Mr. Z. Shabangu (Magagula & Hlophe Attorneys)*