IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 220/2018

In the matter between:-

LAISON NTINI **APPLICANT**

AND

EMTFUNTINI INVESTMENT (PTY) LTD **RESPONDENT**

Neutral citation	:	*Laison Ntini v Emtfuntini Investment (Pty) Ltd (220/2018) [2022] SZIC 80*
CORAM	:	**DLAMINI J,** *(Sitting with **A.S. Ntiwane & S.P. Mamba** Nominated Members of the Court)*
Last heard	:	**11 February 2022**
Judgement Delivered	:	**22 June 2022**

Summary: ***Labour law – Unfair Dismissal:*** *Applicant was dismissed without a hearing by the Respondent for a number of alleged work related transgressions. He requested for a letter confirming that he had been dismissed and the reasons for his dismissal. In this letter he was informed of the reasons for his dismissal.* ***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 and that such dismissal must be for a valid reason.* ***Held Further:*** *Dismissal of the Applicant in casu was both procedurally and substantively unfair.*

1. The Applicant in this matter is Laison Ntini, whilst the Respondent is Emtfuntini Investment (Pty) Ltd. The Applicant is a former employee of the Respondent and he has filed this unfair dismissal claim against the Respondent for compensation, notice pay and underpayment. The Respondent strongly opposes the claims of the Applicant and contends that the Applicant was never dismissed but the parties separated by mutual agreement.

2. In his testimony under oath, the Applicant informed the Court that he was employed by the Respondent in February 2017, as a Truck Coordinator, with a monthly salary of E8,000 (Eight thousand emalangeni). At the end of the first month, he was paid his remuneration of E8,000 without any qualms. However, he says from the month of March onwards the Respondent informed him that he would be paid on a commission basis. Indeed from March 2017 he says he was paid on a commission basis despite his protestation. According to the Applicant, the payment of his remuneration on a commission basis significantly reduced his monthly remuneration.

3. Further evidence by the Applicant was that in November 2017 his troubles with the Respondent started. He informed the Court that a truck loaded with fertilizer bags had some of its consignment missing when delivery was made. According to the Applicant the truck took the consignment from Malkerns, Farm Chemicals, and the load was to be delivered at Maphalaleni. The Applicant further informed the Court that the driver of the truck did not report to him about the shortage, instead he reported to the client, Farm Chemicals. He then reported to Mr. Mamba, the owner of the Respondent, about the shortage and to his surprise he (Mamba) said both the Applicant and the Driver of the truck were liable to pay for the missing fertilizer bags. This did not sit well with him, especially because he says the Driver had taken responsibility for the missing bags and had even offered to pay for them.

4. The Applicant's further evidence was that at the end of November 2017 he was not paid his salary despite that all the other employees had been paid. When he enquired about his salary he says Mamba informed him that he would only pay him once he stated how much should be deducted for the short fertilizer bags. He says he was

eventually paid his November salary on 12 December 2017. When he was paid the November salary he says Mamba also verbally informed him that his services were terminated with immediate effect.

5. The Applicant informed the Court as well that in January 2018 he approached Mr. Mamba to request for a letter confirming that his services had been terminated. Indeed he says Mamba compiled the letter confirming that his services had been terminated. This letter is exhibit LN-1, and it is dated 17 January 2018. In this letter the Director of the Respondent was accusing the Applicant of a number of transgressions, which he says lead to the decision to terminate his services. Amongst the accusations were the following;

- *Poor work performance in that the Applicant is said to have failed to organize cross border loads.*
- *That he devoted his time to his private business of selling second hand steel containers.*
- *That he organized trips for other transporters.*
- *That he failed or refused to apply for a valid passport for him to travel to South Africa when necessary.*
- *That he defrauded the Respondent money that was paid to him by one of the Respondent's customers.*

6. As a result of the Applicant's misconduct aforementioned, the letter continues, the Respondent took a 'business decision' to terminate his services. In his evidence in-chief and under cross questioning, the Applicant denied all the allegations against him as contained in the letter of January 2018. He wondered why he was not called to a disciplinary hearing, where he would have defended himself, if indeed these allegations were true.

7. Under cross examination by the Respondent's representative, the Applicant denied as well that he had agreed with the Respondent's Director that he would be paid on a commission basis from March 2017, and that he would receive E300 for each cross border load. The Applicant also informed the Court under cross questioning that in September 2017, the Director of the Respondent stopped his trucks from the cross-border routes because he said there was not much money made from these cross-border loads. Another reason for stopping the cross-border travel, according to the Applicant, was that when there were mechanical breakdowns on the trucks they would be easy to attend to locally. Finally, the Respondent's representative put it to the Applicant that his services were terminated by mutual

agreement as a result of his poor work performance and the other allegations against him in terms of the letter of January 2018 letter. This the Applicant vehemently denied.

8. Testifying in support of the Respondent's case was Sifiso Mamba, the Director of the Respondent. He testified under oath that he employed the Applicant at the beginning of the year 2017, when he started the trucking business. He also informed the Court that their initial agreement was that the Applicant would be paid E8,000 and that this salary would be performance based. At the end of February 2017, the Applicant was paid the E8,000 as agreed. However, at the beginning of March 2017, the parties again agreed that the Applicant's remuneration would now be restructured to a basic of E3,200 and a commission of E300 per load, per month. According to Mamba, the Applicant never complained about the reduction/restructuring of his salary and he is surprised that it is now an issue here in Court.

9. Then in respect of the termination of the Applicant's services, Mamba informed the Court that he summoned the Applicant to a meeting on 12 December 2017, and informed him that his services would be

terminated with immediate effect because of his poor work performance and since there was not much business, which he says the Applicant accepted. When the Applicant came back to request for the letter confirming that his services had been terminated, he says he then wrote the letter dated 17 January 2018.

10. Under cross examination, Mamba insisted that he engaged the Applicant on a number of occasions concerning his poor work performance and ultimately decided to terminate his services because there was no improvement on his part, despite that he had all the resources availed to him. When questioned why a disciplinary hearing was not convened to determine the Applicant's guilt in respect of the allegations against him, Mamba only concede that no disciplinary hearing was convened but could not explain why. He reiterated that he took a 'business decision' to terminate the services of the Applicant.

11. Perhaps to start off, one should point out that in terms of our law, and specifically section 22 of the Employment Act 1980, it is compulsory for employers to complete, keep and give each employee a completed written particulars of employment form. This form has to be given to

each employee within 2 months of his appointment into his/her position. This important form contains such information as the date employment began, the remuneration and how it is to be calculated, the intervals of the remuneration payment, hours of work, the duties of the employee, the probation period etc. At section 23 of the same Employment Act, there is also a peremptory provision that both the employer and employee have to sign this form. The reasoning behind this form is not difficult to fathom; it is meant to protect both employers and employees should there be a dispute between them on any of the issues of their relationship.

12. In this matter, for instance, there is a dispute between the parties about the remuneration that was agreed on. Had the Respondent prepared and had this form the Court would easily have made reference to it. As it is there is now 2 mutually destructive versions before Court. Even though the Respondent confirms that the parties initially agreed on remuneration of E8,000 per month, he says in the very next month of March 2017, they again agreed to reduce the salary to E3,200 and E300 per load per month. This the Applicant denies. At section 26 of the Employment Act it is provided that where the terms specified in

the section 22 form are changed, the employer shall notify the employee, in writing, of such changes. Again, this is meant to protect the parties should there be a dispute such as the present.

13. In terms of the law the Respondent was supposed to notify the Applicant in writing of the changes it contemplated making to his terms and conditions of service. In this case, the Respondent was supposed to write to the Applicant to inform him that their initial agreement on his monthly remuneration being E8,000 was being altered to E3,200 per month and E300 per load. The failure of the Respondent to adhere to the provisions of the Employment Act leaves the Court inclined to come to the conclusion that the Respondent unilaterally changed the salary agreement of the parties. As such, it is a finding of the Court that the Applicant is entitled to the short payment on his remuneration from March 2017 to the date of his dismissal. These underpayments are as follows: March – E1,800, April – E4,500, May – E3,300, June – E4,800, July – E3,300, August E2,700, September – E4,400, October – E4,800 and November – E4,800.

14. Then in relation to the termination of the Applicant's services, this Court has in a number of its decision reiterated that all cases of unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. It has been stated countless times that no dismissal will ever be deemed fair if it cannot be proved by the Employer that it was initiated following fair procedure – 'procedural fairness'. Not only that, the Employer also needs to prove to the Court that the termination was also for a fair reason – or 'substantive fairness'. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for terminating the employment of the employee.

15. Now, in this matter the Respondent informed the Court that the termination of the Applicant's services was by mutual consent. However, exhibit 'LN1' tells a completely different story. In this letter, the Applicant was informed that the Respondent took a 'business decision' to terminate his employment because of the following reasons; a) poor work performance – the allegation here was that he was failing to organize cross border trips, (b) his failure to

apply for a travel document/passport and (c) fraud – in that he did not remit certain moneys paid by one of the clients.

16. In respect of all the allegations levelled against the Applicant by his employer, as stated above, the rules of natural justice require that the Respondent should act in a semi-judicial manner before imposing the decision to dismiss him. This is what is called procedural fairness. A fair procedure is what discourages arbitrary and impulsive action against employees. What the Respondent did in this matter was nothing more than a spur-of-the-moment decision. The Applicant was just called in and verbally told that he was being dismissed, effective immediately. Initially, no reasons were given for the decision but after pestering the Respondent's Director he was then informed of the reasons for his dismissal through the letter of 17 January 2018, which was more than a month after he was dismissed. It has been said that even in situations where management is convinced of the guilt of the employee, it is still obliged to ensure that a fair disciplinary process is observed (***See: Nkosinathi Ndzimandze & Another v Ubombo Sugar Limited IC Case No. 476/2005***).

17. In ***Mphikeleli Shongwe v Principal Secretary Ministry of Education (Unreported) IC Case No. 207/2006,*** 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.'* 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.'*

18. In other words, even if there are valid substantive reasons for a dismissal, an employer must still follow fair procedure before dismissing an employee. It is unacceptable that at this contemporary age we still have employers who can still dismiss employees at a whim. With that said, it is accordingly a finding of this Court that the dismissal of the Applicant was procedurally unfair.

19. As stated above, the substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for dismissing the Employee. There has to be a justification or a valid

reason for the dismissal of the Employee. Not only that, the employer has to present evidence substantiating the reason for the dismissal. For the fraudulent activity the Applicant was accused of for instance, the onus was on the Respondent to bring forth evidence of this alleged transgression. But no evidence whatsoever was brought forth to prove that indeed the Applicant had committed this offence. As it is, the Court is not aware how much was involved in this alleged fraud or who the defrauded client was. For this reason alone, it is accordingly a finding of the Court as well that the dismissal of the Applicant was also substantively unfair.

20. There are a host of other transgressions alleged against the Applicant but not a shred, and in some instances, not enough of evidence was brought forth to substantiate them. In respect of the alleged poor work performance imputed to the Applicant for instance, the Court in determining whether the dismissal is fair or not has to consider; a) whether or not the employee failed to meet a performance standard and (b) if the employee did not meet a required performance standard whether or not – (i) the employee was aware, or could reasonably have been expected to have been aware, of the required performance

standard, (ii) the employee was given a fair opportunity to meet the required performance standard and (iii) that dismissal was an appropriate sanction in the circumstances of the case.

21. In terms of the foregoing, the onus is on the Respondent to satisfy the Court, on a balance of probabilities, that the dismissal of the Applicant for reasons of poor work performance was substantively fair. In ***General Motors (Pty) Ltd v NUMSA obo Ruiters (2015) 36 ILJ (LAC)*** the South African Labour Appeal Court held that the employer has a duty to investigate all possible alternatives short of dismissal, and that this duty accords with the onus of proving the fairness of the dismissal.

22. Again in ***Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (2014) 35 ILJ 943 at paragraph 25*** the Labour Appeal Court stated:

> *'In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that* ***the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is***

serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore, the employer should be able to demonstrate that the failure to meet the standard of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.' (Emphasis added)

23. In this matter of Laison Ntini, there is no evidence that he was afforded sufficient training in order for him to improve on his performance for instance. There is also no evidence that was given guidance on how to improve his performance. Nor is there evidence that he was given counselling. This is yet another reason the Court comes to the conclusion that the dismissal of the Applicant was substantively unfair.

24. Coming to the appropriate compensation, the Court has considered that the Applicant secured alternative employment a year after his unfair dismissal by the Respondent. The Court has also taken into account that the Applicant was under the employ of the Respondent for slightly less than a year. In the circumstances, the Court considers

compensation of 6 months to be equitable for the procedurally and substantively unfair dismissal of the Applicant. The Respondent is also to pay the Applicant for the 9 months short payment in his remuneration.

25. Taking into account all the factors and circumstances of this case, the Court will make an order that the Respondent should forthwith pay the Applicant as follows;

(a) Notice Pay	E 8,000
(b) 6 months compensation for unfair dismissal	E48,000
(c) Underpayments	E34,400
Total	**E90,400**

There is no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 22ND DAY OF JUNE 2022.

For the Applicant : *Attorney Mr. N. Nxumalo (MTM Ndlovu Attorneys)*
For the Respondent : *Mr. E. Dlamini (Labour Law Consultant)*