



**IN THE INDUSTRIAL COURT OF ESWATINI**

HELD AT MBABANE

Case No. 343/2017

In the matter between:-

**XOLISA MAPHANGA**

APPLICANT

And

**LIMKOKWING UNIVERSITY OF**

RESPONDENT

**CREATIVE TECHNOLOGY**

**Neutral citation:** Xolisa Maphanga v Limkokwing University of Creative  
Technology (343/2017) [2022] SZIC 98 (19 August 2022)

**Coram:** **THWALA - JUDGE**  
(Sitting with Mr M. Mtetwa and Mr A.M. Nkambule,  
Nominated Members of the Court)

**Heard:** 28<sup>th</sup> JUNE 2022.

**Delivered:** 19<sup>th</sup> AUGUST 2022

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## JUDGEMENT

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### Introduction

[1] This trial was heard on various dates, spurning across the first and second session of the Court, the last of which was the 28<sup>th</sup> June 2022.

### Non- contested facts

[2] The following facts are rather common cause, and therefore not the subject of enquiry in this case, to wit:

2.1 That, Applicant was first employed by Respondent in the position of a lecturer within Respondent's University.

2.2 That, the nature of the contract between the two parties was in the form of fixed-term, the first of which commenced on the 8 February 2013. Although, there is no documentary proof of this first agreement, it is however, not in dispute that the first agreement subsisted from February 2013, upto the end of 2015.

2.3 That, on the 8 February 2015, Applicant and Respondent purportedly concluded another agreement, this time in writing, which spelt- out the salient terms and conditions of their engagement, i.e. "employment as a lecturer in the Faculty of Business and Globalization".

2.4 That, Applicant's services were terminated before this second agreement could run its three (3) year full term, apparently because of Applicant's gross neglect of duty.

2.5 That, it is the conclusion of this Court, as regards the evidence adduced before it in support of either of the parties' assertions, on the issue under sub-paragraph 2.4 above, which will then assist to determine the outcome of this case.

#### Applicant's case

[3] In his statement of claim, Applicant had alleged that his services were unfairly terminated both procedurally and substantively. Regarding, procedural unfairness, Applicant alleged that the Chairperson of appeal had dismissed Applicant's application for her (Chairperson's) recusal and further omitted to furnish reasons for the dismissal of Applicant's application to her recusal.

[4] On the question of substantive unfairness, Applicant alleged that Respondent failed to adduce sufficient evidence, during the disciplinary hearing, to prove the allegation of gross insubordination.

#### Respondent's case

[5] For its part, Respondent averred that Applicant's services were fairly terminated both as to the procedure that was followed as well as to the issues of substance, i.e. gross insubordination. Full and further particulars of Respondent's case appear from the testimony of its witnesses below.

### Applicant's testimony

- [6] In his evidence in chief, Applicant told the Court that he started working for the Respondent in 2013, initially on a 12 months fixed term contract which was then renewed in 2014, and was to run for a period of three (3) years upto 2015. As proof of the second contract, Applicant drew the attention of the Court to a written document, being an annexure to his notice of application. Indeed, on the face of it, the said document is described as a fixed term contract of employment entered into between Respondent, as the employer and Applicant, as the employee.
- [7] In its body, the document sets out certain obligations between the parties inter se, the most basic of which were; firstly, Respondent's offer to employ Applicant as a lecturer, which was followed by a clear and unequivocal acceptance of same by Applicant. Secondly, Respondent's undertaking to remunerate Applicant for the services to be rendered, and lastly, the parties' intention to be legally bound by their respective obligations.
- [8] Indeed, Applicant's evidence confirmed the smooth subsistence of the above situation between the parties, from the 8 February 2015, up till June 2016, when Respondent then allocated extra duties to Applicant, i.e. that of being a lecturer for Corporate Finance. Applicant proceeded to tell the Court that it was Respondent's duty to prepare and handover to him (Applicant) the Corporate Finance course outline. It was Applicant's assertion that this was normal practice, i.e. part of the employer's duty to provide/ furnish its lecturers with all the tools to enable them to execute their duties effectively.
- [9] Applicant further told the Court that a faculty staff meeting was held sometime in early June 2016, the purpose of which was to prepare for the commencement

of lectures for the 2016/17 academic year. As a lecturer within the Faculty of Business and Globalization, Applicant worked under the direct supervision of Richard Sibandze, who was the senior lecturer.

[10] According to Applicant, it was Sibandze, as his immediate supervisor who had the responsibility to ensure that Applicant received all the assistance to enable him to timeously produce the module outline for its filing with the department. Indeed, it was Applicant's assertion, firstly, that the filing of these documents with the department was delayed apparently because of Sibandze's failure to cooperate with Applicant. Herein, it was Applicant's assertion that it was Sibandze's failure to furnish him (Applicant) with the precedent/ stencil that was necessary to assist Applicant in coming up with the course outline for Corporate Finance that hindered him in the due execution of his responsibilities. Here we pause to record that, indeed the gravamen of this case appears to turn on this very question, to wit: whether there was a legal duty that vested upon Sibandze, on behalf of the Respondent, qua employer, to furnish Applicant with the said precedent so as to enable Applicant to prepare the Corporate Finance module outline.

[11] It was Applicant's further testimony that it was the failure to receive any form of assistance from Sibandze which then led him to take the matter up with Sibandze's supervisors, these being, the Programme Leader, Thobile Gumede as well as the Head of the Department, Hlobisile Shongwe. However, Applicant did tell the Court that before approaching the head of department and programme leader, Sibandze had advised him (Applicant) to approach one Thulani Ngcamphalala, a colleague who was teaching Corporate Finance the previous year. It would appear that Applicant did not take heed of Sibandze's advice but

opted to escalate the issue up with the Programme Leader and the head of department.

[12] The meeting between the head of department and the programme leader appears to have attracted more severe consequences for Applicant, for it was at that meeting that the head of department issued an ultimatum to Applicant to come up with the module or face disciplinary action. Applicant testified that around August 2016, he finally came round and produced a module outline which he submitted to Richard Sibandze for approval. Unfortunately Sibandze rejected same presumably for failure to meet the expected standard for a module. Indeed, the adequacy of this document for its purpose was put under the test, both by Mr Gamedze, in his cross-examination of Applicant as well as during counsel's closing submissions before us.

[13] It was Applicant's further averment that Sibandze's refusal to cooperate with him was the cause for the barrage of problems that surfaced in respect of the course for Corporate Finance, such as Applicant's inability to upload the student's marks onto the department's system. This was due to the fact that Sibandze had omitted to 'enable' Applicant to access the system so as to be able to upload his student's marks. Here, it is worth noting that the availability of the marks on the University's system was critical not only for the programme leader or the head of department, but for the external examiners that were retained by Respondent to moderate the quality of the University's programmes.

[14] So it was that when time for the moderation of student's marks came, Applicants' were not uploaded onto the system for easy access by the other lecturers and the moderators. This then is what prompted Respondent to institute the disciplinary action against the Applicant, in terms of which Respondent charged Applicant

with three counts of misconduct, being; dereliction of duty; gross insubordination and insolence.

[15] The first sitting of the disciplinary hearing was scheduled for the 31<sup>st</sup> January 2017, before an external Chairperson, and Applicant tendered a plea of “not guilty” in respect of all three charges. Evidence having been adduced by the initiator regarding all three charges, the Chairperson found Applicant “*Guilty*” of part one of charge 1; being dereliction of duty in that he failed to produce the course outline for Corporate finance,....as well as charge 2,i.e that of gross insubordination. The element of gross insubordination referred to herein emanated from Applicant’s alleged failure to produce a module file for Principles of Economics as duly instructed by his programmer leader, Thobile Gumede. The Chairperson’s finding of guilt was subsequently followed by a recommendation of summary dismissal, which recommendation was allegedly accepted and carried through by Respondent by way of a letter of Applicant’s summary dismissal dated the 10 August 2017. A subsequent appeal was dismissed, thereby leaving Applicant with no other alternative but to approach CMAC to report a dispute for unfair dismissal.

[16] For his relief, Applicant complained that the sanction that was meted out by the employer was unreasonably too harsh when juxtaposed against the misconduct, including the fact that it was his first offence. Further, that Applicant has never gotten employment since 2017. He concluded by praying for the relief as contained in his notice of application.

#### Applicant’s cross- examination

[17] Then came Applicant’s cross- examination which spurned a period of two full days, partly because of the omission to prepare a proper pre-trial minute, which

would have helped to narrow down the issues that needed to be proved for the expeditious resolution of Applicant's allegations of unfair dismissal. It is therefore to be regretted that Counsel for the Respondent's cross-examination ended up bringing in issues pertaining to the other charges, which were not, strictly speaking, subjects for this adjudication.

[18] Barring all the above side issues, Respondent's Counsel was able to get Applicant to make a few significant concessions, such as the fact that sometime in June 2016, Respondent entrusted Applicant and Thulani Ngcamphalala with the responsibility of co-lecturing Corporate Finance; that the allocation of courses to specific lecturers normally took place way before the commencement of lectures. Applicant also conceded that the filing of the module outline for Corporate Finance was delayed basically because of him and Thulani Ngcamphalala's failure to meet so that they could compile one single module for the two streams that each one of them was teaching. Indeed, it was the two gentlemen's failure to meet which then precipitated the subsequent barrage of communications between Applicant, on the one part, and the other members of the faculty, on the other. And on this score, Mr Gamedze tried to get Applicant to admit that he was the principal cause of the delay, to this Applicant either tendered bare denials and/ or a "*I have no comment*" for an answer.

#### Respondent's case

[19] For its case, Respondent paraded two (2) witnesses, being Thulani Ngcamphalala (RW 1), the lecturer who was appointed to co-teach Corporate Finance together with Applicant, and Thobile Gumede (RW2), the Programme Leader and immediate supervisor for Ngcamphalala as well as the Applicant. And in his testimony, Ngcamphalala told the Court that he joined Respondent's employ in



August 2014, as a lecturer in the Faculty of Business Organisation. This faculty was said to host several courses, including business mathematics; business finance; corporate finance; entrepreneurship and principles of economics.

[20] As regards the 2016 academic year, RW1 was allocated to co-teach two courses, being corporate finance and tourism economics. Indeed, it is now common cause that the corporate finance course was allocated to Applicant and RW1. This instruction/ allocation was done by the Head of Department during the lecturer's meeting that was held on the 9<sup>th</sup> June 2016. Again, it was common knowledge, firstly, that when the said lecturer's meeting was held, the university was on break, and secondly, that same was in preparation for the commencement of the 2016/17 academic year, which was scheduled for August 2016.

[21] Perhaps the most important purpose of this meeting was to enable each individual lecturer to prepare his/her module outline, in respect of the subject and/or course allocated to them for approval by their immediate supervisors. It is needless to state that this process was expected to occur well before the date set for the commencement of lectures. In the case before us, RW1 testified that the task of coming up with one common course outline for Corporate Finance had to be discharged jointly by him and Applicant. This necessarily meant that Applicant and RW1 had to agree, between the two of them, about a convenient time and place to meet so as to prepare their course outline. Unfortunately the two gentlemen were unable to meet apparently because of clashes of their respective schedules. Here we pause to record that each of the two gentlemen attested to the effort that was made by them to meet the other. Obviously, these were oral assertions which lacked any extrinsic evidence except the word of one person against the word of the other.

[22] The verbal accusations between Applicant and RW1 then took a turn on the 9 August 2016, when RW1 ventilated his frustrations, via an email, with Applicant's continuous unavailability for the meeting to come up with a course outline for Corporate Finance. It was RW1's evidence that at the time when he decided to write this email, i.e. on the 9 August 2016, Corporate Finance was the only subject whose course outline had still not yet been submitted for scrutiny and approval by the head of the department. From here, RW1 was led by Counsel for the Respondent, to recite the countless efforts, in the form of written correspondences, wherein various efforts were expended, by not just RW1, but other members of the department, all of whom were aimed at getting Applicant to make himself available for the meeting with RW1. The efforts referred to herein, which were specifically mentioned by RW1, included, the email from Richard Sibandze also of even date in which Sibandze also tried to reign upon Applicant to cooperate with RW1 so as to facilitate the production of the course outline.

[23] This written request by Sibandze failed to yield any fruitful results, nor did the meeting that was convened, again by Sibandze on the 11 August 2016, wherein in his capacity as a principal lecturer, Sibandze tried to re-emphasise the need for Applicant and RW1 to cooperate with each other. Regrettably, this meeting, according to RW1, ended up degenerating into a verbal showdown between Applicant and Sibandze, with each accusing the other of things that were unknown to RW1. In the end, Sibandze ended up directing each party to produce and submit separate course lines to him as principal lecturer for moderation and eventual approval. For his part, RW1 submitted his to Sibandze who proceeded to sign and authorize same for use and distribution as a basis for lectures for RW1's class of Corporate Finance. None was ever submitted by Applicant which then led to significant disparities in the manner that this particular subject was being taught,

including unsynchronized dates for tests and assignments. This apparent lack of similarity of this course between that offered by Applicant, on the one hand, and the one offered by RW1, on the other, resulted in student protests.

[24] RW1 was then subjected to a very lengthy process of cross-examination by Counsel for the Applicant. The gist of this was to get RW1 to concede that it was the failure of Respondent and/or its agents, i.e. Head of Department and/or its principal lecturer to furnish Applicant with the materials that was necessary to enable him to come up with the course outline, which caused Applicant to default on his obligations. Alternatively, Mr Ndlangamandla pressed RW1 to concede that Applicant did eventually prepare and submit a course outline to the principal lecturer who however, rejected it. Much was also said about RW1's supposed failure to share with Applicant past course outlines which were used by previous Corporate Finance lecturers.

[25] The next witness to be called on behalf of Respondent was Thobile Gumedze, RW2, the Head of Department, who went on to confirm that three (3) charges of misconduct were preferred against Applicant, two (2) of which led to Applicant's eventual dismissal, being Applicant's failure to produce a Corporate Finance module outline as well as gross insubordination. RW2's testimony corroborated RW1's evidence in all respect except for one or two occasions wherein the witness was led by Mr Gamedze to stray off onto other courses wherein Applicant had failed to deliver. This piece of RW 2's evidence has no relevance to the present proceedings and as such no further reference shall be made to same.

[26] Under cross-examination, RW 2 was quizzed by Mr Ndlangamandla about the severity of the sanction that was meted out, especially with regard to the fact that Applicant had had no previous warnings. RW 2 refuted this allegation and went

on to confirm the appropriateness of the sanction of dismissal which the witness claimed was somewhat supported by the fact that Applicant had been found guilty of two (2) of the three (3) charges. This assertion was obviously correct because the Chairperson's ruling, which was handed in as part of Applicant's case, makes it clear that Applicant was found "guilty" of the first part of charge 1, being the dereliction of duty for the failure to prepare and submit a module outline for Corporate Finance. Applicant was also found guilty of charge No. 2, being that of gross insubordination in that he again failed to compile a module outline for Principles of Economics.

[27] The author John Grogan- Workplace Law-11<sup>th</sup> edition says:

**"Insubordination is a more serious offence than mere rudeness because it presupposes a calculated breach by the employee of the duty to obey employer's instructions."**

Regarding the circumstances where insubordination is so 'gross' so as to warrant a summary dismissal, Grogan says:

**"This means that the insubordination must be serious, persistent and deliberate and that the employer should adduce proof that the employee was in fact guilty of defying an instruction".**

In the circumstances of the case before us, gross insubordination maybe taken to mean Applicant's conduct which undermined Respondent's authority, which conduct was aggravated and/or made more serious by certain attendant circumstances. It is now trite law that the seriousness and/or gravity of the insubordination must be weighed not in isolation but together with other factors such as the action of the employer prior to the alleged act of insubordination; the reasonableness or otherwise of the order that was defied.

[28] Mr Ndlangamandla's cross-examination of Respondent's witnesses served only one purpose, being that of demonstrating Applicant's failure and/or inability to work as part of a team. Indeed, the contents of almost all of Applicant's emails was high-handed and very aggressive to all of Respondent's staff regardless of their rank and/or status within Respondent's establishment. There was nowhere, either in his evidence in-chief and /or during the cross-examination of Respondent's two witnesses, where this Court was left in doubt regarding Respondent's case. In other words, the evidence that was adduced made it clear to the Court that Applicant had, as early as June 2016, adopted a very confrontational tone towards his colleagues, including his supervisor.

[29] In the circumstances as well as on the totality of the evidence that was adduced before us, we find that Applicant's dismissal was substantively fair for his multiple acts of failure to execute lawful instructions, which failure smarked of stubbornness and wanton disrespect for authority.

[30] As regards the question of procedural unfairness, Applicant appeared to attribute same to some flaw on the fact that his appeal was chaired by a lady from Respondent's sister campus in Lesotho. Applicant's complaint about this Chairperson was said to be premised on the fact that she was a Human Resources Manager and therefore most likely to be privy to disciplinary issues for all of Respondent's campuses within the region, i.e. Botswana; Lesotho and Eswatini. The import of Applicant's argument herein was to suggest an element of bias on the part of the appeal Chairperson. Unfortunately, Applicant's suspicions lacked tangible facts to back it, in fact, when he was quizzed by the Court, Applicant was willing to concede that this was his own '*gut feeling*'. For its part, our law has set the test for determining bias as being '*the existence of a reasonable apprehension/ suspicion of bias*'. Whilst this is viewed from the stand point of a lay person, the standard of

proof that is applied thereof is the objective standard. See Graham Rudolp v Mananga College and Another, IC Case No. 94/2007.

[31] And the duty to prove the existence of this reasonable apprehension of the Chairperson of appeal's bias layed with Applicant through concrete evidence, which Applicant did not do. Applicant's failure to adduce any evidence on this aspect leaves the Court with no alternative but to hold that Applicant's suspicions lacked any reasonableness and could not therefore be sustained in law.

[32] Regarding the question of the reasonableness of the sanction that was eventually meted out by Respondent, both Mr Ndlangamandla as well as Applicant appeared to find fault (an element of unfairness) in the context of the dismissal. Indeed, Applicant even went on to suggest that a final written warning would have been the most appropriate sanction. For our part, we can only opine that the giving of a final written warning is not a legal requirement, but rather that each case must be determined on its own merits. Again, Grogan provides some illumination of this area when the author says:

**“The proper measure of the gravity of insubordination.....is the effect it has on the employment relationship. Other things, being equal, an isolated refusal to carry out an instruction is less likely to destroy the relationship between the employer and the employee than sustained and deliberate defiance of authority....mere frustration with working conditions is not enough to justify a refusal to obey reasonable and legitimate instruction.”**

[33] To sum it all up, there can be no doubt that Applicant was a senior member of the Respondent who was, prior to this incident, well versed with all the processes and procedures that were involved in the development and eventual approval of teaching

materials for the University. The need for 'assistance' in respect of the production of the two (2) modules was therefore dubious.

[34] In the result;

34.1 Applicant's claim for unfair dismissal must fail in its entirety.

34.2 There shall be no order as to costs.

The Members Agree.

*M. Thwala*

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M. M. THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant : Mr N. Ndlangamandla.

For Respondent : Mr B. Gamedze.