



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 482/13

In the matter between:-

NCANE NKAMBULE

Applicant

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK Respondent

Neutral citation: Ncane Nkambule Vs Swaziland De4velopment and Saving Bank
(482/13) [2023] SZIC 125 (December 2023)

Coram: **DLAMINI NGA'NDU - JUDGE**
*(Sitting with Miss P.P. Dlamini and Mr N.M.V. Gumbi
Nominated Members of the Court)*

HEARD: **25 September 2023**

DELIVERED: **07 December 2023**

JUDGEMENT

[1] The Applicant, one Ncane Nkambule an adult female Liswati has filed before Court an application for determination of an unresolved dispute against the Respondent, Swaziland Development and Savings Bank, her former employer.

[2] In her application, she is claiming for compensation for unfair dismissal alleging that her dismissal was both procedural and substantively unfair and thus praying for;

1. Unpaid salary for March 2011 at E25 111.83
2. Unpaid 7 days for April 2011 at E6 910.83
3. Notice pay, one month E25 666.83
4. Additional notice pay E19 743.80
5. Severance allowance E49 359.50
6. Compensation for unfair dismissal E308 001.96
7. Further and or alternative relief.

[3] At the close of the Applicant's case the Respondent moved an application for absolution from the instance based on the fact that the Applicant made some admission in her *viva voce* evidence such that there is no need for Respondent to come and prove that it was reasonable for the Respondent to terminate Applicant's employment.

[4] The principle applicable to absolution from the instance for consideration by the Court at the close of the Applicant's case is whether there is evidence upon which a reasonable man might find for the plaintiff and not should or ought to find for the Applicant.

[5] It is worth pointing out that **Section 42(2) of the Employment Act** shift the burden of proof to the employer (Respondent herein) where there's a claim by the employee that the dismissal was unfair either procedurally or substantively. See **SIBONGINKHOSI XABA VS CIVIL SERVICE COMMISSION and 2 others 155/2018** per S. Nsibandze J.P. in which case his Lordship drew a distinction between absolution from the instance in ordinary civil case and labour matter. It was stated as follows;

*“This is the position that prevails in civil cases where the Applicant is expected to place a prima faica case to be answered by the Respondent. I dare say there is a slight but significant difference where absolution is sought in labour matters. The difference in our view is brought about by **Section 35(2)** as read with **Section 42(2)** of the **Employment Act of 1980**.*

[6] The shifting of the burden as indicted above in essence means the employer need to demonstrate that the dismissal of the employee was procedurally fair. This the employer can do through;

- The very papers filed to record in response to the allegation of unfairness

- Challenging the Applicant through cross-examination by eliciting sufficient evidence to dislodge the Applicant's case
- Cross-examination of the Applicant and his or her witnesses that punches holes in the Applicant's case such that no reasonable man applying their minds to the case can possibly rule in favor of the Applicant, in other words living no case to answer
- Admissions made by the Applicant.

[7] In the case of **SABELO TSABEDZE VS SWAZILAND ELECTRICITY COMPANY case no. 134/10** per Justice Nkonyane J it was held that;

*“In an application for determination of an unresolved dispute where the Applicant claims that he was unfairly dismissed the burden of proof is on the employer. In terms of **Section 42(2) of the Employment Act**, the employer may discharge the burden resting on it by eliciting evidence through cross-examination of the Applicant if the employer is able to elicit sufficient evidence during cross-examination there will be no need for the Court to require the employer to advise further evidence absolution from the instance ought to be granted.”*

[8] In the present case the Applicant made several admissions in her viva voce evidence and during cross-examination, admission that go sharply against her claim of unfair dismissal both procedurally and substantively.

[9] In the following paragraph I will point out briefly a few of those admissions made by the Applicant that render it unnecessary for the Court to call upon the Respondents to answer these are as follows;

- 1. The Applicant acknowledged the fact that she was a senior officer at the Respondent Bank and she had officers that she was supervising under her.**
- 2. Being a supervisor and senior officer who had worked for the Respondent for several years (stated years) she was very much aware of all the Respondent's policies pertaining to payment to Respondent customers**
- 3. She admitted that she was aware of the Respondent's rules in relations to payment of withdrawals of E5 000.00 and above in particular the need to verify with the account holder if withdrawal of E5 000.00 and above were made by third parties**
- 4. Applicant also admitted that she was fully aware that all cheques with the amount of E20 000 and above presented for payment or deposit needed to be confirmed with the drawer (Account holder)**
- 5. She further admitted that despite this knowledge of these policies in place at the Respondent's work place she ignored the Bank procedures and policies when dealing with the transaction for the account of JCL Sea Food Wholesalers as well as the personal account for Mr. Patrick Adams in that;**
 - 5.1. She allowed one Vuyisile Hlatjwako to effect withdrawal from Mr. Patrick Adams personal account without confirming or consulting the said Mr. Patrick Adams**
 - 5.2. Despite being aware that the letter written by Mr. Adams brought by Vuyisile stating that the said Vuyisile was only allowed to**

confirm cheque nothing more, she allowed her (Vuyisile) to exceed her mandate in terms of the letter by allowing her to make withdrawals from Mr. Adams's personal account without confirming with Mr. Adams the account holder

- 5.3. She further admitted to have signed and authorized the withdrawal of E30 000.00 and forwarded to her manager as well as the withdrawal of E20 000.00 for payment suggesting that she had done her due diligence this the subsequent payment of the said funds**
- 5.4. The Applicant also admitted that due to her failure to follow procedure put in place and policies of the Respondent, the Respondent as a result lost substantial amount in excess of E70 000.00 she also admitted to have entered a plea of guilty at the disciplinary hearing for the charges of gross negligence as she acknowledged that she did something wrong though not intentionally.**
- 5.5. Applicant further through cross examination admitted that even procedurally there was no unfairness on the part of the Respondent, and all that she was pleading for was leniency with the penalty of dismissal**

[10] Having carefully considered all the admissions made by the Applicant in this case in her examination in chief as well as during cross-examination it becomes clear that the Applicant actually made out a good case for the Respondent; such that it would be unnecessary for this Court to call upon the Respondent to lead any evidence to discharge the burden placed upon them to prove the fairness of the Applicant's dismissal in terms of **Section 36** as read with **Section 42 of the**

Employment Act 1980. Application for absolution from the instance is accordingly successful and the Applicant's case is dismissed. Each party is to bear their own costs.

Thus delivered this 7th day of December 2023

The Members Agree.



D. F. DLAMINI-NGA'NDU

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : Mr. J. Mndzebele

FOR RESPONDENTS : Mr. S, Dlamini