IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 256/2017

In the matter between:-

HAPPINESS LAPIDOS Applicant

And

E-TOP UP (PTY) LTD Respondent

Neutral Citation	:	Happiness Lapidos **v** E-TOP UP (Pty) Ltd, Case No.256/2017 SZIC [2023] (22 November 2023).
Coram	:	**THWALA - JUDGE.** (*Sitting with Mr. M.T.E Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court).*
Date of Submission	:	27 September 2023
Judgement Delivered	:	22 November 2023

JUDGEMENT

Introduction

[1] Applicant's case is premised upon all three (3) grounds of unfair dismissal, i.e substantive; procedural and unreasonable under the circumstances of the case.

[2] Before commencement of the trial, Counsel for the parties met to prepare a detailed pre-trial minute which was then read into the record by Mr. Jele. The Court is grateful to both Counsel because through their effort, the Court has been able to discern quiet a substantial portion of the issues for adjudication in this matter, for its part, the pre-trial minute revealed that the following facts were not under any contention, *viz*:

2.1 The identity and relationship of the parties including the fact that Applicant was employed on the 1 July 2005, and dismissed on the 9 March 2017;

2.2 The substantive position that was held by the Applicant at the time of her dismissal, i.e that of Head of Operation, including her monthly earnings of E38, 880-00;

2.3 The fact that Applicant's charges for bringing the name of the company unto disrepute stemmed from a disciplinary hearing in which she appeared as the initiator on behalf of the Respondent. We may pause here to mention that the gravamen of this case turns on the construction and meaning given to certain words that were uttered, by the

Applicant during that hearing. For the purposes of convenience, we shall henceforth term this the 'first hearing', and Applicant's disciplinary hearing as "the second hearing";

2.4 From the pre-trial minute, it is recorded that Applicant used insultive language against a fellow employee who was the accused in the first disciplinary hearing. It is recorded that the accused employee, who was charged before the first hearing was one Sindi Tsabedze, who, unfortunately has since passed on.

2.5 Having uttered the alleged derogatory word, Applicant was then charged with two (2) counts of misconduct, the first, being the use of insultive language against a fellow employee, and the other one, being that of bringing the name of the company into disrepute.

2.6 It is recorded in the disciplinary minutes that a two-stage hearing was held and it confirmed Applicant's guilt on both counts, after which she was thereafter dismissed.

2.7 The minutes further crystalized the triable issues as being:

2.7.1 whether Applicant had committed the acts of misconduct which thereafter led to her subsequent dismissal.

2.7.2 whether the disciplinary chairperson held any, extra-curial meetings with members of the Respondent's team in the absence of the Applicant.

2.7.3 whether it was fair and reasonable, in the circumstances of the ease, for the Respondent to dismiss the Applicant.

[3] Whilst alleging that Applicant was unfairly dismissed in terms of all the three elements which sustains the grant of a relief and/or a finding of liability before this Court, the Applicant then proceeded to pray for the reliefs as set out in her statement of claim, with the exception of the prayer for reinstatement, which Applicant opted to abandon. Applicant prayed for notice pay; severance allowance; additional notice pay; 12 months maximum compensation for unfair dismissal plus costs of suit.

[4] In her evidence in-chief, Applicant went on to confirm the undisputed facts as read into the record by Mr Jele. As to the alleged utterance of the insult against the fellow employee, Applicant told the Court that it was in the course of the first hearing which was held against Sindi Tsabedze that the said Sindi Tsabedze then alleged that she had been insulted by Applicant. Applicant testified that she never insulted the said Sindi Tsabedze, but merely gasped in shock when she (Tsabedze) claimed, in her testimony in-chief, that Applicant had threatened Tsabedze with dismissal. Applicant told the Count that she was shocked because such allegations were not true. It was at this point, according to the Applicant, that the said Sindi then shouted and said **"yini ngatsi umphatsi uyangetfuka utsi ngiyanya"**.

[5] Applicant told the Court that the Respondent's Human Resources Manager (HR), who was sitting next to her nudged her with her elbow and cautioned her to be careful because she (Applicant) could be charged. It was Applicant's

evidence that the sitting arrangement in the room was such that her and the HR were sitting next to each other, whilst facing Sindi Tsabedze and her representative. These, in turn were sitting next to each other, with the chairperson of the disciplinary hearing sitting right at the head of the Boardroom Table. Whilst Applicant appeared to have no qualms with the HR's conduct against her, she was however, very quick to point out that she had saw no fault in the manner that she had reacted. She proceeded to categorically deny that she insulted her colleague.

[6] Applicant told the Court that the chairperson then intervened and called the proceedings to order. Most importantly, Applicant placed it on record that Mr Maduduza Zwane, who was the chairperson of the first disciplinary hearing, cautioned Applicant to allow Tsabedze to narrate her case, in defence, just as Applicant had been afforded the same opportunity to state the Respondent's case. Applicant proceeded to tender her apologies to the chairperson, which apology, according to Applicant, was not for insulting Tsabedze, but for interrupting the proceedings.

[7] It was Applicant's further evidence that immediately after tendering her apology, Tsabedze's legal representative then requested for a postponement of the disciplinary hearing, apparently on the basis that she had been insulted. Applicant tried to bring it to the attention of this Court the manner in which the application for the postponement was structured, i.e-

> **"singeke sisachubeka ngoba utsi Sindi ngatsi umphatsi wakhe uyametfuka".**

Applicant queried the wording that was used by Tsabedze's legal representative whilst conveying an incident that presumably occurred right in

his presence too. This analogy was apparently premised upon Applicant's earlier evidence to the effect that Tsabedze and her legal presentative were sitting arm-to-arm next to each other and directly opposite Applicant and the HR. Applicant claimed that there was no way in which any expletives uttered by her against Tsabedze could have escaped the hearing of Tsabedze's representative. Applicant told us further that even the chairperson of the disciplinary hearing refused to acceede to the application for a postponement. Applicant said that the chairperson's refusal with the postponement then prompted Tsabedze to start crying. Tsabedze's emotional state then prompted the chairperson to have the matter postponed.

[8] Applicant reiterated that she had no reason to insult Tsabedze. The attention of the Court was then drawn to the minutes of Tsabedze's disciplinary hearing which were contained in Applicant's Bundle of Documents ("Annexure A1"). Page 43 thereof is the page wherein Applicant's utterances ought to have been captured. Unfortunately, this page captures none of the exchanges that were allegedly made by and between Applicant; Tsabedze and/or her legal representative. This much was acknowledged by the Applicant, who then proceeded to urge this Court to have recourse to the voice recordal of the minutes of the disciplinary hearing. The voice record itself was to be organized by the parties and then played in open court.

[9] Applicant also made reference to a letter written by Tsabedze's legal representative and dated the 17 November 2015, which in a nutshell, called for the institution of disciplinary proceedings against the Applicant allegedly for using abusive and insulting language against a fellow employee. Indeed, on the 29 January 2016, (not 2015), Respondent caused to issue a notification

of disciplinary charges upon Applicant. The Respondent's notice contained two (2) charges against the Applicant, *viz*: use of derogatory and/or insulting language against Sindi Tsabedze and bringing the name of the company into disrepute.

[10] Applicant appeared before the second disciplinary hearing, this time as the accused employee and at the end of the hearing, was found guilty of both counts. She however, later appealed, whereof the conviction on both charges was corrected and fused into one single charge, apparently on the basis of the doctrine of unfair splitting of charges. The chairperson of appeal allowed the Respondent to pursue its case in terms of one charge instead of the two (2) charges and the Respondent opted for charge #2, i.e that of bringing the name of the company into disrepute. The chairperson of appeal confirmed this charge and Applicant was accordingly dismissed on the same.

[11] At the conclusion of her evidence in-chief, Applicant told the Court that she was no longer interested in re-joining the Respondent but opted for the 12 months maximum compensation together with the other statutory reliefs. Regarding her personal circumstances, Applicant told the Court that her dismissal from Respondent's employ on the 9 March 2017, brought about very dramatic changes onto her lifestyle, including upon her family. She told the Court that life became very difficult as she had to fed for herself and her sickly child who previously attended schooling and medical care in the Republic of South Africa. Both these benefits were lost as Applicant could no longer afford to sustain them anymore. Applicant told the Court that between March 2017, and August 2017, she survived by selling odd stuff, i.e hawking.

[12] Under cross-examination from Mr Gamedze, Applicant confirmed that the cause for her dismissal was charge # 2, i.e bringing the name of the company into disrepute in that on the 2 November 2015, and at Matsapha, she (Applicant) insulted a fellow employee right in the presence of an external person, i.e the chairperson of the first disciplinary hearing, Mr Maduduza Zwane. It is common cause that the legal basis for charge # 2 was premised upon the presence of Maduduza Zwane as well as Zenzi Hadebe at the scene, i.e Matsapha, wherein it is alleged that Applicant uttered the expletive "**uyanya**". This much can be readily seen from the charge letter at Page 47 of the Bundle of Documents that was filed by Applicant's Attorney. It is the substantive fairness of the alleged use of the word "**uyanya**" in the presence of two these (2) outsiders, being Zenzi Hadebe and Maduduza Zwane that must be considered by this Court.

[13] Mr Gamedze's line of cross-examination also took the approach that Applicant had uttered the above-captioned unsavoury word, which utterance was heard by, Maduduza Zwane, as well as Zenzi Hadebe, who was there acting as Sindi Tsabedze's representative. Counsel for the Respondent's assertions were vehemently denied by the Applicant. Mr Gamedze then took Applicant through several pages of Applicant's disciplinary record, most of which involved what was said by the Applicant and/or those that had given testimony thereat, noticeably the then chairperson of Sindi Zikalala's disciplinary hearing, Maduduza Zwane.

[14] Whilst in the course of his cross-examination of the Applicant, Mr Gamedze then applied for the leave of this Court to play the audio recordal of the first disciplinary hearing wherein Applicant acted as the initiator. This application

was granted by the Court, and the following glaring facts emerged from the same –

14.1 Firstly, that the quality of the recording was so poor to be relied upon with certainty.

14.2 That, the utterance of the word "uyanya" came from two (2) distinct female voices;

14.3 That, the Court was now being urged to conclude that it was Applicant who first uttered the word "**uyanya**".

[15] Regarding the question of corroboration, Mr Gamedze put it to the Applicant that, indeed her use of the unsavoury language during Sindi's disciplinary hearing was brought to the Respondent's attention by Zenzi Hadebe, who wrote a formal letter of complaint to that effect. Counsel for the Respondent proceeded further to cross-examine Applicant about the testimony of the Human Resources Officer, one Qhakazile Dlamini, who apparently also came over and gave testimony at the second disciplinary hearing, on what Applicant said at Matsapha on the 4 November 2015. Notewithstanding these recorded allegations, Applicant persisted in her denial of the incidence.

[16] Then came in the question of procedural unfairness, which, according to Applicant, was premised upon the fact that the chairperson of her disciplinary hearing held side meetings with Respondent's witnesses. Applicant was asked as to why she had omitted to raise such an important issue in her grounds of appeal. Not only was Applicant's answer far-fetched, it was also too whimsical to be believed. It was rather very unsavoury to hear Applicant casting aspersions on the ethical conduct of two (2) members of the Bar, one of whom has since departed this realm. It is for that reason that we need

not say more on this aspect of Applicant's relief than to dismiss it for lack of substance.

[17] As to the question of sanction and the provisions of **Section 42 (2) of the Employment, 1980**, Mr Gamedze argued that Applicant's dismissal was a fair one under the circumstances of the case. Of course, Section 42 of the Act proportionally divides the burden of proof between the two (2) litigants, with the Applicant bearing the onus to prove that she was an employee to whom the provisions of Section 35 applied. Indeed, there was no doubt, in this case, that the provisions of Section 35 applied to Applicant, which then left the Respondent to be saddled with the mammoth task of proving to this Court that Applicant's termination was not only substantively fair but also that it passed the test of reasonableness under the circumstances.

[18] Under re-examination, Mr Jele sought to have the audio tape replayed, after which Applicant gave her version to be that she hears one (1) female voice uttering the insult "**uyanya**", which voice she said was that of Sindi. On the question of sanction, Applicant alleged that Respondent had deviated from the established position without prior notification to her.

[19] As has been alluded to above, the burden to prove that Applicant had committed the misconduct of bringing the name of the company into disrepute lied with the Respondent. The test as to whether an employee has brought the name of an employer into disrepute is an objective one[1] In the *Timothy case*, the Court there said -

[1] Timothy v Nampak Corrugated Containers (Pty) Ltd (2010) 8 BLLR 830 (LAC).

"A reasonable decision maker could have engaged in an objective evaluation as to whether the employee brought the name of the company into disrepute. An objective test enjoins an examination, in all the circumstances, of the nature of the conduct, evaluate the turpitude, and seriousness thereof and then makes an evaluation as to whether the charges can be sustained".

[20] The Court is now enjoined by the law to look into the particular circumstances of this case in order to confirm as to whether Applicant did commit a misconduct which can be said to have brought the name of the company into disrepute. And for this purpose, Respondent's Counsel sought to rely upon the audio recording. We have already alluded to our attitude to the evidential value that can be placed upon the contents of this recordal. We place it on record that, whereas the placement of this audio had been by consent of both parties, this however only meant that the question of the authenticity of the audio was admitted by the parties. The same could not be said about its reliability. This was very critical to the Court because the general rules of evidence require that for an audio recording to be admissible, then same must be reliable. For our part, we were unable, upon listening to the audio, to give it the evidential value that is demanded of audio recordings. The cumulative effect of the aforegoing conclusion of the Court, is that the audio tape was unable to bolster Respondent's case as initially intended.

[21] The audio recordal having failed to provide any assistance to the Respondent's case, what then remained was the evidence of one Christopher Wasswa, (RW1). This witness told the Court that he acted as the Initiator in

Applicant's disciplinary hearing. To be fair to this witness, there was no probative value in the evidence that he told to us, principally because of the fact that most of the things that he testified about are things that had not taken place in his presence. Of course it is common cause that the inquiry before this Court pertains to what took place in the first disciplinary hearing and not the second. The methodology adopted by RW1 in the prosecution of the second disciplinary inquiry, which involved the Applicant is therefore peripheral.

[22] It is the attitude of this Court that it was detrimental, for the Respondent, to opt to lead the evidence of RW1, who was nothing but an initiator in Applicant's hearing instead of the prime witnesses in the Sindi Tsabedze case. It is a fundamental principle of our law that decisions of a court must be made based on a witness' personal knowledge. This ensures the probative value, i.e its usefulness towards providing the existence of a fact in issue in a trial. It was common cause, in casu, that the Respondent could have brought some of these witnesses. The Court is obviously aware that Sindi Tsabedze had passed on at the time of Applicant's indictment, but still, the Respondent could have brought at least three (3) of the persons that were there and present on the 4 November 2015, i.e the chairperson of the first disciplinary hearing; the Respondent's HR, Qhakazile Dlamini, as well as Zenzi Hadebe.

[23] Indeed, such an expectation was not too far-fetched because it was apparent from the record of the disciplinary proceedings that was filed by the Applicant before this Court that in the second hearing against the Applicant, Respondent did parade all those that were present at Matsapha on the 4 November 2015. Counsel for the Respondent actually went a step further and used the minutes

of both the disciplinary hearings. It was apparent, during the course of Mr Gamedze's cross-examination that he seemed to rely on its contents as being a correct reflection of what it purported to be. Perhaps, this is what might have detracted Mr Gamedze from parading these very key witnesses before us.

[24] Whatever Mr Gamedze's position might have been as regards the legal status of the minutes of the first disciplinary hearing, our law of evidence is clear that to the extent that these witnesses were never brought before us, then whatever their evidence might have been at the disciplinary hearing, it is hearsay evidence and therefore inadmissible before us[2]. In the *Ngwenya case*, the Court there said –

> **"29. The evidence of Shongwe recorded in the minutes of the disciplinary hearing is hearsay, and cannot be tested by cross-examination. It is inadmissible to prove the truth of the facts stated by Shongwe at the hearing. Nevertheless, it has certain circumstantial value which is relevant to the issues before the court. <u>See Hoffman: SA Law of Evidence (2nd Ed.) page 90.</u>**

[25] Judge Prisloo[3] laminated the question of the status of disciplinary records when purportedly filed as evidence in court, when he said:

> **"[56] In litigation, parties would prepare bundles of documents and the documents included in the trial bundles would be included as documentary evidence which the parties intend to rely on in support of their respective case. It is a common practice for parties**

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[2] Zephania Ngwenya v Royal Swaziland Sugar Corporation (262/2001) [2007] SZIC 7 (17 January 2007). At 29
[3] Hillside Aluminium (Pty) Ltd v Mathuse and Others (2016) 37 ILJ 2082 (LC).

to agree on the status of the documents to be included in the trial bundle.

[57] In my view there are three possible scenarios.

[58] The first scenario is where there is no agreement on the authenticity or status of documents or when the authenticity is disputed. In such instances, the party wishing to produce a document and wants to rely on the document as evidence, has to prove the authenticity of the document by leading evidence and, if the authenticity is not proved or admitted, the document is inadmissible, may not be used in cross-examination and cannot be considered as evidence.

[59] The second scenario is where the parties agree that the documents are what they purport to be. This means that the party wishing to rely on the document does not have to prove the authenticity of the document but may lead evidence and rely on the document on the basis that it is what purports to be. In this instance documents must be introduced as evidence and cross-examination on such documents is permissible. The presiding officer can accept the document as evidence insofar as it was properly introduced by witnesses. Where a document is agreed to be what it purports to be, but no evidence is adduced on the document, the presiding officer cannot mero motu consider such document as evidence merely because it is included in a trial bundle.

[60] The third scenario is where the parties agree that the documents in the bundle should be regarded as evidence. In this instance the presiding officer is entitled to accept the contents of the documentary evidence as if it were evidence adduced before

him or her and even if no witness testifies about it, it can be considered as relevant and admissible evidence".

[26] We have taken time to extensively recite the position of the law regarding the issue of the status of the socalled "minutes/record of the disciplinary hearing" in order to place them in their proper perspective. It is therefore clear, in the circumstances of this case that it was not enough for the Respondent to seek to rely on the minutes of the first disciplinary hearing, since its contents were hearsay and therefore inadmissible. It is further apparent, from the above-cited legal authorities that both the audio recording as well as the minutes/record of the disciplinary proceedings of the 4 November 2015, are inadmissible evidence. This is so notwithstanding the fact that the parties had agreed that these two documents were what they purported to be.

In casu, it is common cause that whereas the introduction of these two documents onto this trial was by consent of both Counsel, this however, did not extend to its usage at the trial. As has already been shown above, Applicant minced no words in placing at issue Counsel for the Respondent's allegations to the effect that it was her voice (Applicant's) which was audibly uttering the word "**uyanya**" in the audio tape. Any contradictions between the document, and/or audio tape needed to be cleared by witnesses through oral evidence. In the circumstances of this case, it is the finding of this Court that the Respondent has failed to discharge the burden that is vested upon it by Section 42 of proving that Applicant's services were fairly terminated.

[27] Having determined that the services of the Applicant were unfairly terminated, what now remains is for the Court to embark upon the inquiry that is prescribed by **Section 16 of the Industrial Relations Act, 2000**, as amended, Section 16 (6) provides that:

> **"The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for the dismissal was a fair reason ....., must be just and equitable in all the circumstances, ...**

The above-captioned sub-section enjoins the court to make sure that it has recourse to the circumstances of each of the parties, circumstances in order to come up with a fair and just decision. The pre-trial minute that was filed by Counsel for the parties revealed that Applicant had served the Respondent for eleven (11) years. No evidence was led, by the Respondent, to show that Applicant's record, within those years was anything except unblemished. Indeed, the aforegoing position does receive backing from Applicant's ascension to the position of senior manager.

[29] In her statement of claim, Applicant had initially prayed for reinstatement, but in her evidence in-chief she told the Court that she was now pursuing the alternative prayer for maximum compensation. In addition to the claim for 12 months compensation for unfair dismissal, Applicant sought for notice pay; one month's notice pay; additional notice together with severance allowance.

[30] **Section 42 (2) (a) of the Employment Act, 1980**, makes it clear that it is the Respondent who bears the onus of showing that it dismissed the Applicant for a reason that is permissible under Section 36 of the Act. It is not for the

Applicant to prove her innocence but for the Respondent to advance evidence to satisfy the legal requirements. This is the onus that Respondent failed to discharge. Having considered the circumstances of this case, it is the opinion of the Court that an award of three (3) months compensation for unfair dismissal would be just and fair for the Applicant.

[31] The Applicant is also entitled to be paid notice pay; additional notice as well as severance allowance. **Accordingly**, judgement is entered in favour of the Applicant as follows:

31.1	**Notice Pay**	**E38, 880-00;**
31.2	**Additional Notice**	**E77, 759-00;**
31.3	**Severance Allowance**	**E194, 399-99;**
31.4	**Three (3) months compensation**	
	For unfair dismissal	**E116, 640-00**
	TOTAL DUE	**E427, 628-99**

[32] Respondent is directed to settle this judgement debt within 14 days from the date of delivery of this judgement.

The members agree.

Manene M. Thwala

Judge of the Industrial Court of Eswatini

For Applicant : Mr Derrick. N. Jele.

For Respondent : Mr Banele Gamedze.