



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 93/17

In the matter between:-

SIPHO ANTHONY MKHABELA

Applicant

And

THE CENTRAL BANK OF ESWATINI

Respondent

Neutral citation: Sipho Anthony Mkhabela v The Central Bank of Eswatini (93/17)
[2023] SZIC 130 (August, 2023)

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

HEARD: 1 October 2023

DELIVERED: 22 December 2023

JUDGEMENT

[1] The Applicant herein, one Sipho Anthony Mkhabela filed an application for the determination of an unresolved dispute on the ground of unfair dismissal against the Respondent (employer). He was therefore seeking for an order for:

- Re-instatement and/or transfer to another department

Alternatively

- Notice pay of E36 995.00
- Additional notice pay E188 338.00
- Severance allowance E470 845.00
- Maximum compensation for unfair dismissal E443 940.00
- Cost of suit
- Further and or alternative relief.

[2] The Respondent vigorously opposed the application and at the close of the Applicant's case, Respondent, through its counsel, indicated that it wished to apply for absolution from the instance and they did hence the present ruling.

Test for absolution from the instance;

[3] In the case of **GORDON LLOYD PAGE AND ASSOCIATES vs RIVERA AND ANOTHER 2001 (1) South Africa (sca) Harms JA** held that;

"....The test has from time to time been formulated in different terms especially it has been said that the Court must consider whether there is evidence upon which a reasonable man might find for

the plaintiff a test which has its origin in jury trials when "reasonable man" was a reasonable member of the jury.....such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgement and not that of another "reasonable" person or "court"

It was therefore decided per Justice Masuku J. in the case of **TWK AGRICULTURE LIMITED vs SWAZILAND MEAT INDUSTRIES and SIMUNYE CATTLE COMPANY, CASE 4263/05 (High Court)**

"....The learned Judge of Appeal advocated for a test where the Court trying the case and not some after Court or person, brings its own judgement to bear on the evidence adduced before it and it decided whether the plaintiff has at the close of its case, made out a case such that the Court could or might find for it even in the absence of the defendants evidence at that stage...."

[4] The question to be determined by this Court therefore is whether from the evidence presented by the Applicant before Court, has the Applicant at the close of his case, made out a case such that the Court could find for him even in the absence of the Respondent's evidence.

[5] It is worth pointing out here however that there is a distinction between absolution from the instance in ordinary civil case and absolution from the instance in labour matters. It was pointed out in **SIBONGINKHOSI XABA vs CIVIL SERVICE COMMISSION AND 2 OTHERS 195/2018** per S. Nsibande JP. Where he stated as follows;

*“...This is the position that prevails in civil cases where the Applicant is expected to place a prima facie 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 is in our view brought about by **Section 35(2)** as read with **Section 42(2) of the Employment Act 1980...**”*

[6] In the case where the Applicant claims that he was unfairly dismissed from the employment, the provision of **Section 42** of the Employment Act apply relating to the burden of proof. In terms of **Section 42(2)**, the burden is on the employer to prove;

- a) *“That the reason for the termination was one permitted by Section 36, and*
- b) *That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee”*

[7] The Applicant has to only demonstrate that at the time his services were terminated he was an employee to whom **Section 35 of the Employment Act**

applied. Once he establishes that, the onus shifts to the employer to prove that the dismissal is one permitted by **Section 36 of the Employment Act** and that in the circumstances of the case it was reasonable to terminate his services. See **ABRAHAM DLAMINI vs VUVULANE FUNERAL ASSOCIATION case no. 87/98**

[8] It is also worth pointing out that when an application for absolution from the instance is made, it calls upon the Court to therefore evaluate and compare all available evidence at that stage and see if the Applicant, in relation to the claim, has a prima facie case. I dare say that absolution at the close of the Applicant's case will, in ordinary course of event be sparingly granted when the need arises based on evidence presented and in the interest of swift justice for all.

[9] Turning to the evidence of the Applicant in this case in summary, the Applicant gave his testimony under oath. He told the Court that he was employed by the Respondent in March 1987 and had worked for the Respondent for 29 years when his services were terminated by the Respondent on the 31st of October 2016. He stated that at the time of his termination he was then the settlement accountant having been promoted to that position in 2007.

[10] The Applicant went on to detail his job description/ duties as follows;

10.1. To receive payment instructions from Swaziland Government treasury department

10.2. To supervise the staff at the back office

10.3. To authorize payment instructions

10.4. Checking the accuracy of figures to see if there were enough funds to cover the payment instructions by Government or within the Central Bank

10.5. To authorize or verify swift payment instructions on the swift messaging system.

[11] Applicant went on to refer the Court to page 3 of Exhibit A (Applicant's bundle of documents) that detailed "Job Description" of a "Settlement Accountant". He also explained that he was reporting to Manager Back office Ms. Busi Dlamini.

[12] The Applicant confirmed that he was indeed found guilty of Count 2 and 3 out of the 10 Counts he had been charged with which were as follows;

12.1. There is prima facie evidence that you were guilty of the offence of dishonesty and/ or alternatively gross negligence in that while you were responsible for the supervision of the operation of the back office for purposes of minimizing operational risk, you concealed and/or alternatively failed to disclose and or escalate to management of the Bank of a fraudulent transaction that took place on or about the 18th September 2013 amounting to E1 252 125. 43 thereby placing the Bank in potential financial loss.

12.2. There is prima facie evidence that you are guilty of the offense of dishonesty and/or alternatively gross negligence in that while you were responsible for the operations of the back office for purpose of minimizing operational risk, you concealed and or alternatively failed to disclose and/or escalate to management of the attempted fraudulent transaction amounting to the sum of E6 000 000.00. Involving Phumzile Mkhathswa, which took place on or

about 19th September 2013, yet you knew about the attempted fraudulent transaction.

[13] Applicant in his viva voce evidence under oath admitted that;

- 13.1. Indeed he became aware of the E6 000 00.00 suspicious transaction which was hanging on the swift payment system and which transaction had no source documents and was unauthorized. He also admitted that, with regards to that transaction he became aware that Ms. Tsidi Loate and Ms. Phumzile Mkhathshwa had exchange passwords to impute that transaction, something he knew was not allowed but simply instructed Ms. Tsidi Loate to delete the transaction, he never reported it to his immediate supervisor but merely spoke strongly against the use of another's credentials in the payment system.
- 13.2. The Applicant further spoke of the transaction of the 18th September 2013 that of the unauthorized E1 252 125.43 which also had no source documents and was a duplicate transaction and there was a change of beneficiary to Basadi Logix. Applicant admitted that he actually caused it to be reversed and according to him once again spoke strongly to the employees involved but did not report it to his supervisor and according to him because he did not suspect any fraudulent act and he had caused it to be returned to the Bank's account.
- 13.3. Finally after failing to report the transaction on the 18th and 19th September 2013 then the actual fraud on the 16th of October 2013 of the **E7 500 000.00** where by his name and that of **Thabile Ginindza** were used in the process.

[14] Indeed the Applicant was therefore accordingly charged of gross negligence and or not escalating or reporting the attempted frauds above as they placed the Bank in a financial risk and eventual the substantial loss of the E7 500 000.00. He was found guilty of two of those counts and subsequently dismissed.

[15] The Applicant appealed the sanction, it is noted, alleging that it was harsh. He had abandoned the appeal on the conviction, possibly in view of the fact that Applicant conceded that all procedural rights were observed by the Respondent during his hearing.

[16] It is however worth noting that the Respondent has in place the Collective Agreement- Memorandum of Collective Agreement entered into by and between Central Bank of Swaziland (Respondent) and Swaziland Union of Financial Institution and Allied Workers (SUFIAW). That collective agreement was signed on the 11th November 2004. It came with a disciplinary code and procedures.

[17] The Disciplinary Code and Procedures stipulate in Clause 5.2 thereof “Grounds for disciplinary Action. In Clause 5.2.1 it lists examples of offences which may lead to disciplinary action such as summary dismissal, dismissal final written warning, written warning, verbal warning noted or demotion and suspension.

[18] The offence that the Applicant was charged with fell under example 5.2.1.19 thereof;

“Failing to adhere to procedures and to carry out legitimate and lawful instruction or neglect of duty, where the penalties

- *1st offence - verbal warning noted*
- *2nd offence – written warning*
- *3rd offence – final written warning*
- 4th offence – dismissal*

[19] The above Code and Collective Agreement is binding on the parties that is the union and the Respondent. We noted the chairperson’s recommendation which seem to suggest that the chairperson was alive to the provisions of the code and that the Applicants’ offence to the bank (Respondent) he was a first offender.

[20] E7 500 000.00 is indeed, by any stretch of anyone’s imagination, a substantial loss to the Respondent, making the offence serious. That as it maybe, we also note the provision of **Section 36**, “fair reason for the termination of an employee’s service” in particular **Section 36 (a) of the Employment Act**,

36 “It shall be fair for on employer to terminate the services of an employee for any of the following reasons

- a) Because the conduct or work performance of the employee has after written warning been such that the employer cannot reasonably be expected to continue to employ him....”*

[21] Having considered both the collective agreement between the Respondent and the Applicant union, as well as the above provision of the **Employment Act, Section 36 (a)** above, it is the Courts considered view that the Respondent has a case to answer with regard to the sanction the Respondent opted for in the Applicant's case in view of the fact that the Applicant was a first offender.

The Members Agree.

A handwritten signature in black ink, consisting of a large loop followed by a horizontal stroke, positioned above a solid horizontal line.

D. F. DLAMINI-NG'ANDU

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : M. Nhlengethwa

FOR RESPONDENTS : N.D. Jeje