



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 195/2018

SIBONGINKOSI XABA

Applicant

and

THE CIVIL SERVICE COMMISSION

1st Respondent

THE PRINCIPAL SECRETARY

2nd Respondent

MINISTRY OF HEALTH

MINISTRY OF PUBLIC SERVICE

3rd Respondent

ATTORNEY GENERAL

4th Respondent

Neutral Citation: Sibonginkosi Xaba vs The Civil Service Commission and 3 Others (195/18) [2024] SZIC 83 (September 2024)

Coram:

L.L. HLOPHE—JUDGE

*(Sitting with Mr. E.L. B. Dlamini and Mr. M.P. Dlamini
Nominated Members of the Court)*

Delivered:

04th September 2024

Summary: *Labour Law – Theft from an employer – Employee charged with three counts arising from the same set of facts – namely theft – failure to heed an instruction to return the stolen item-whether charging the employee with all three counts as different offences not constituting a splitting of charges or whether same ought to have been alternative charges. Effect of such conduct on the employment*

relationship discussed. All constituting dismissible dishonest acts if proven. As they go to the root cause or substratum of the employment relationship: duty of the employee to establish a prima facie case discussed – duty of the employer to discharge the onus of proof that the dismissal was fair and in accordance with Section 42 (2) of Employment Act/1980

JUDGMENT

1. The Applicant instituted these proceedings claiming to have been unfairly dismissed from his employment by his employer, The Government of Eswatini, who acted through its agency responsible for the employment and discipline of its employees known as The Civil Service Commission.

2. As a result of the alleged unfair dismissal the Applicant claimed the following reliefs:-

a) Re-instatement and /or alternatively

(i) Notice Pay	E3,516.17
(ii) Additional Notice Pay	E7,573.29
(iii) Severance pay	E18,933.22
(iv) Leave Pay	E2,299.03
(v) July Pay	E3,516.17
(vi) Compensation for unfair dismissal	E42,194.04

TOTAL	<u>E78 031.92</u>
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- (b) Costs of suit
- (c) Further and/ or alternative remedy.

3. It is not in dispute that:-

- 3.1 The Applicant was employed by the ESwatini Government through The Civil Service Commission sometime in 1998.
- 3.2 He was employed as a Hospital Orderly and was based at the Hlathikulu Government Hospital where he remained until his dismissal effective 24 June 2013 in terms of a letter written to him by the Chairman of the Civil Service Commission dated 1 July 2013.
- 3.3 On a day whose date is not being mentioned nursing sister Shongwe whilst attending to a patient in one of the wards found that the fridge used in that ward for the safekeeping of HIV testing kits which should always be kept under cool conditions was found missing from the ward with no immediate answer as where it was, in fact, the said kits were thrown out onto to some table.
- 3.4 Although nursing sister Nosipho Shongwe immediately reported her discovery to the Hospital Administrator, there was no immediate clue on what had happened to the fridge. The matter was nonetheless reported to the police. Nursing Sister Nosipho Shongwe testified before court as RW1.

- 3.5 According to the other witness of the Respondent, Thabsile Florence Shabangu RW 2, on a certain day after the refrigerator in question had gone missing. She was approached by the Applicant who disclosed to her that he had committed a wrong by, taking away the missing refrigerator.
- 3.6 She told him to return the refrigerator at least three times that day. Asked on the status of that, she testified that she related it as both advice and an instruction. She was in a position to instruct the Applicant because she was his immediate supervisor and superior as the Senior Hospital Orderly. Although she had expected him to comply, he had refused to return it. As a result of the stance taken by the Applicant she decided to report the missing refrigerator to the Hospital Administrator, who advised that she was already aware about the missing refrigerator.
- 3.7 Although the Hospital Administrator first wanted to know from her what could be done, including reporting the development to the police she had informed the Administrator as her superior that how she dealt with the matter was well within her right. The latter ended up reporting the missing refrigerator to the police.
- 3.8 The witness, (Miss Shabangu) was called by the police to join them as they went to the Applicant's place concerning the missing Fridge.

- 3.9 The Applicant was found outside his house or flat washing his clothes, although he had started off not wanting to co-operate as the police introduced their mission he changed and co-operated when they became tougher than before.
- 3.10 Finally the refrigerator was retrieved from the Applicant's place, where it was at the time found to have been in use. Items found to have been kept in it included meat, milk carrots and alcohol according to Ms Shabangu, RW2.
- 3.11 The Applicant was subsequently charged with the theft of the Fridge in question although he was now claiming to have borrowed the Fridge in question from a certain nurse whose particulars he however, could not reveal except to say that the nurse in question was there on a particular HIV project.
- 3.12 The Civil Service Commission preferred three counts against the Applicant as follows: Theft, in that he stole the refrigerator in question; Un-authorized borrowing of the same refrigerator referred to in the first charge as well as Insubordination, constituting in the refusal to carry out a lawful instruction. Arising from his failure to return the same fridge when instructed by his supervisor.
- 3.12.1 A comment is warranted on the charges concerned. It sounds strange that all these three counts related to the removal and failure to restore the same fridge.
- 3.12.2 It is glaringly improper that the Applicant could possibly be charged with both theft and unlawful borrowing as independent counts to each other and not as alternative counts. Again if the

understanding from the onset was that the fridge had been stolen, or alternatively borrowed without authority, which may imply a permanent removal it is difficult to imagine the reality of an instruction to the same person who helped himself to it being made for him to return same . The point being made is that implicit in theft or unlawful borrowing for an indefinite period is a permanent deprivation. This implies that the conceptualisation of the charges as they stand was somewhat a contradiction in terms.

3.12.3 It therefore did not come as a surprise that one of the charges was withdrawn that is that of theft. Again to a lay person it might have appeared as a major blow to the Respondent's case now that what appeared to be a major charge was now being abandoned.

3.12.4 Again to a Labour Lawyer that withdrawal of the charge of theft may not have meant much. This is because both the charges of theft and unauthorized borrowing belong to the same genre of offences known as dishonest acts. The catch here is that dishonest acts by their nature are, and have to be taken very seriously by employers. It has been said, and this has been applied consistently, that by their very nature dishonest acts or acts of dishonesty attract a dismissal as a sanction. This is because they have the tendency to go to the root

cause of the employer/employee relationship and there destroy the trust which forms the substratum or bedrock of that relationship. See in this regard what was said by the court in *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union Another* (1991)12 ICJ 340(LAC). The Labour Appeal Court stated the following with regards to theft in the employment relationship; -“*In my view it is axiomatic to the relationship between an employer and an employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in his employee is basic to and forms the substratum of the relationship between the employer and the employee.*”¹

3.12.5 **John Grogan**, *workplace law*,² Describes theft in the workplace context as a form of dishonesty, including other forms of underhand conduct, just as unlawful borrowing which destroys the trust relationship. Grogan (supra) suggests that what matters is that the employee’s dishonesty has destroyed the trust upon which the employment relationship is founded. See *Standard Bank v South Africa Ltd v CCMA and others* (1998) 19

¹ John Grogan. Workplace Law tenth edition (Juta, South Africa 2010) at page 211.

² John Grogan. Workplace Law tenth edition (Juta, South Africa 2010) at page 211.

ILJ 903 (LC): SAPPI Nava Board (PTY) Ltd v Bolleurs (1998) 19 ILJ 784(LAC).

3.12.6 In *Anglo American Farms (1992) 13 ILJ 573 (LA)* The court held in that judgment that the test was whether the employee's action "*had the effect of rendering the relationship of the employer and employee intolerable.*"

The court held further that in determining whether the relationship had become intolerable, other factors had to be considered such as whether the employee's theft was premeditated and carefully planned. This would disclose a "*thieving propensity on his part.*"³

3.12.8 In a disciplinary action hearing that ensued, the Applicant was found guilty of the offences of an authorized borrowing a fridge and failure to heed a lawful instruction to return the same item, also known as insubordination. He was dismissed after a hearing where his employer led evidence that pointed to his guilt.

3.13 The present proceedings are a culmination of that dismissal following a report to the Conciliation Mediation Arbitration Commission (CMAC) where an attempt to resolve the matter failed.

³ John Grogan. *Workplace Law* tenth edition (Juta, South Africa 2010) at page 212.

- 3.14 Before this court, the Applicant contented that his dismissal was unfair. Looking closely at what he said in this court and in his pleadings, his dismissal was unfair because he had allegedly not helped himself to the fridge or removed it without authority. He said that he had been given authority to remove it by a certain nursing sister. The said nurse had allegedly been part of the implementation of a special foreign sponsored project on HIV/AIDS prevention at the Hlatikhulu Government Hospital.
- 3.15 The Applicant failed to make out a case in support of this contention. Whilst he claims to have been given permission to remove the fridge he does not give precise details of the person he claimed gave him the authority required. He chose to give a vague identity of the officer who is supposed to have given him permission to take the fridge. A conclusion is inescapable that he was given no such authority. This is because no person or official could be confronted to verify if he did give such authority. Indeed if the Applicant himself would not call that officer or official as a witness to confirm the version he was alluding to.
- 3.16. We clarify that, whereas it cannot be denied that in labour matters the duty to prove that the dismissal was fair in accordance with Section 36 of the Employment Act/1980, and that taking into account all of the circumstances of the matter it was fair to dismiss as

required by Section 42 of the same Act. It is the Applicant who is himself enjoined to establish a prima facie case of an unfair dismissal. This is where, by claiming he was authorised to remove the fridge by an unidentifiable officer, the Applicant was himself failing to establish a *prima facie* case. In order to enable verification of this contention of the Applicant which, in any event was denied by the Respondent, the Applicant should have given an identifiable officer or even called her as a witness. This failure to give a clear identity of the officer who he claims gave him the authority to remove the fridge, made it difficult for the Respondent to call that witness for him/her to confirm the correctness of the Applicant's contention. If this could not be confirmed, the inescapable conclusion is that the Applicant had not obtained authority to remove the Fridge, and therefore that he committed an act of theft or unauthorized borrowing.

3.17 In his opposing papers and in evidence before court, the Applicant had contended that he was targeted for a dismissal by his employer because he had written a letter to that (ACC) Anti-Corruption Commission on corrupt practices that were ongoing at the hospital perpetrated allegedly by the management of the hospital as it were. The copy of the letter in question was annexed to the pleadings.

3.17.1 It is noteworthy that the letter in question was written on the 13th September 2013 when the charges were

preferred against the Applicant a year earlier in October 2012.

- 3.17.2 The Applicant contended that the charges against him were prompted by his said letter of the 13th September 2013, and were aimed at silencing him.
- 3.17.3 There is something amiss in this contention. The charges could not have been meant to silence him as they were actually preferred earlier than his complaint to the ACC by about a year.
- 3.17.4 The Applicant's contention about him being victimized for raising and telling on certain corrupt activities that were allegedly being committed by the Management of the Hlathikulu Hospital cannot be true. We say this because the Applicant himself cannot deny that he did take and keep in his possession a refrigerator belonging to the hospital under very questionable circumstances.
- 3.17.5 The facts suggest that it was taken sometime on the 12th February 2012 and only recovered under police help in August 2012. The question is therefore why, if he had borrowed it for a function as he suggested in his evidence, did he keep it for several months without returning the same? It cannot therefore be correct that the charges against him were perpetrated because he had written to the Anti-Corruption Commission, telling on the alleged corrupt activities of the Hospital

Management. His purported telling via the letter of the 13th September 2013, happened after the fridge had been taken by him in February 2012 with its recovery being between May 2012 and August 2012. Whilst the charges against Applicant were laid in October 2012.

3.18 Whereas in his papers and in his evidence before this Court, the Applicant claimed not to have been afforded an opportunity to call his witnesses and to cross-examine those of the employer, the Respondent's witnesses denied that.

3.18.1 Respondent's witnesses, nursing Sister Nosipho Shongwe and Ms Thabsile Florence Shabangu confirmed in open court that they were called in the presence of the Applicant during his disciplinary hearing before the Civil Service Commission to testify, which they did as they again did before this court.

3.18.2 His case is bad because he is shown to be untruthful, as the Respondent's witnesses who implicated him testified that they were actually called during the disciplinary hearing. They were also called before this court, where they were called upon to repeat their evidence against him.

3.18.3 The Industrial Court does not sit as review or appeal Court for the disciplinary hearing panel. It conducts its own enquiry into the allegations of misconduct. Before

the Court, the employer was able to show that the Applicant did commit the offence contemplated by **Section 36(b) of the Employment Act of 1980**. Section 36(b) provides that it shall be fair for an employer to terminate the services of an employee-:

“because the employee is guilty of a dishonest act, violence, threats or ill treatment towards his employer, or towards any member of the employer’s family or any other employee of the undertaking in which he is employed.”

3.18.3 Lastly, whereas he claims that as a person who had no record of misconduct, he should not have been dismissed, it is true that such a contention is not informed by law. In terms of the labour law practised in this jurisdiction there are those offences particularly those that touch on dishonesty, where a single act of dishonesty in a rather blemish-less record would or does warrant a dismissal. This is because of what we have already alluded to, that dishonesty is in law viewed as an act which diminishes the trust which is the bedrock in an employer and employee relationship.

4. Having dealt with the matters revealed in the evidence together with the analysis of the said evidence we are now required to look at how those issues impact on the law, including what the law says should happen. The position of our law is that the employer has a duty to prove not only that the dismissal of the employee was for a ground contemplated by Section 36 of the Employment Act of 1980, but also that taking into account all the

circumstances of the matter as envisaged by Section 42 of Employment Act it was fair and reasonable to dismiss.

5. In the case of the Applicant herein, it has been shown that the act of misconduct committed by the Applicant was in violation of Section 36 of the Employment Act in so far as it had dishonesty as its element. In numerous cases of this court, and the Industrial Court of Appeal it has been stated that because of its very nature, it diminishes the trust the employer is entitled to have from an employee.⁴ See in this regard Tip AJ's comment in *Standard bank SA Ltd v CCMA and others [1998] 6 BLLR 622 at para 38-41*; Where his Lordship stated the following; "*It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee. A breach of this trust in the form of conduct involving dishonesty, is one that goes to the heart of the employment relationship and is destructive of it*".
6. This aspect, confirms the requirement imposed by **Section 42 (2) of the Employment Act of 1980**, to the effect that when taking into account all these circumstances of the matter, it is fair and reasonable to terminate that employment relationship.
7. Consequently, and taking into all the circumstances, we cannot find fault with the Respondents decision as the employer in dismissing the Applicant as its employee. We agree that the dismissal of the Applicant was for a ground contemplated by Section 36 of the Employment Act/1980 and that taking into account all the circumstances of the matter, the dismissal was fair and reasonable.

⁴ RSSC v Paul Mavundla case 5/2006. Where the court stated that it can be fair to dismiss lowly paid employees for theft of even small items, as the value cannot be determinative just as the length of service.

8. Accordingly, the Applicant's application does not succeed. It is dismissed with each party bearing its own costs.

The members agree.



L.L HOPHE

JUDGE-INDUSTRIAL COURT OF ESWATINI

For Applicant: Advocate Hlanze

T.V. Hlanze Attorneys

For Respondent: Ms. Shabalala

Attorney Generals Chambe

Mbabane