



IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

APPEAL CASE NO: 1/2019

In the matter between:

FIRST NATIONAL BANK SWAZILAND LIMITED APPELLANT

And

LUNGILE MASILELA RESPONDENT

Neutral Citation: *First National Bank Swaziland Limited vs. Lungile Masilela (1/2019) [2019] SZICA (09) 16th October 2019*

Coram: **MLANGENI AJA, MAPHANGA AJA, SHABALALA AJA**

Heard: **16th September 2019**

Delivered: **16th October 2019**

Summary:

Labour law - employee charged for misconduct at the workplace - found guilty of dishonesty and dismissed - upon application to the Industrial Court, the court found that the employee was dishonest and that the dishonesty destroyed the relationship of trust between the employer and employee.

Court also found that the employer did not observe the principle of parity in that a co-perpetrator was not charged and put to discipline, and that for this reason alone the dismissal was substantively unfair.

On appeal by the employer, it was:-

Held:

That the court-a-quo having found that the employee was dishonest and therefore dismissible in terms of Section 36 of the Employment Act 1980, erred in then holding that the dismissal was substantively unfair only because the principle of parity was not observed by the employer.

Held, further,

That the dismissal of the employee was fair and reasonable in the circumstances, and that there was therefore no need to invoke the provisions of Section 34 (1), 33(7) and 33(8) of the Employment Act 1980 so as to award the Applicant notice pay, additional notice and severance pay.

Appeal Allowed.

Respondent cross-appealing on the basis that:-

- i) The trial court, having found that the employee was substantively unfairly dismissed, ought to have exercised its discretion in terms of Section 16 (1) and (2) of the Industrial Relations Act of 2000 and ordered reinstatement or re-engagement.*
- ii) The court order that was the subject of dishonesty was tainted with illegality and fraud, hence it was not proper to hold that the employee was dishonest in diverting it so as to thwart its execution.*

*Held: Both grounds of cross-appeal dismissed.
No order as to costs.*

JUDGMENT

[1] This is an appeal from the judgment of His Lordship Dlamini J. in Industrial Court Case No. 212/2012, which was handed down on the 30th January 2019. The Appellant, First National Bank of Swaziland Limited, was the Respondent in the court of first instance and the present Respondent was the Applicant then. Upon the filing of an appeal by the Appellant the Respondent not only opposed the appeal but also filed a cross-appeal. For the sake of simplicity I will refer to the parties in two phases as follows: at the court of first instance I will refer to them as Applicant and Respondent respectively, and at the appeal stage, in this court, I will refer to them as Appellant and Respondent respectively, it being accepted and understood that the Respondent doubles up as cross-appellant and the Appellant as cross-Respondent.

[2] The matter before the *court-a-quo* was an application for determination of an unresolved dispute. Until the 22nd August 2011 the Respondent was an employee of the Appellant. On the 23rd August 2011 she was dismissed, having been in continuous employment for about ten years. She alleged that her dismissal was procedurally and substantively unfair and claimed notice pay, additional notice pay, severance pay and compensation for a period of twelve months, all totaling E427, 364.91. She was dismissed for dishonestly in that she allegedly received a garnishee order in respect of herself and instead of putting it through the right channel to the institution's paymaster she diverted it, with the result that deductions on her salary were not effected per the **"court order"**. It is apparent that to achieve this mischief she took advantage of her position as payroll administrator in the Human Resources department of the Respondent. According to the particulars of the offence, the garnishee order had not been located as at the date of her disciplinary hearing. According to the Respondent, this conduct constituted dishonesty, alternatively gross misconduct.

[3] The matter was heard in the court *court-a-quo* and after a thorough and well-reasoned analysis of the evidence of both sides the Honourable Judge found as a fact that the Applicant had indeed **"diverted the garnishee order with the intention of concealing it from the employer."**¹ The court further observed that:-

".....it follows that she was being dishonest in her conduct. Her underhand conduct undermined the trust upon which the employment relationship is built....."².

¹ Judgment, at para 26

² Judgment at para 27

[4] Having come to the unwavering conclusion that the Applicant's conduct was dishonest, the court nonetheless did not find that the Applicant's dismissal was justified in terms of Section 36 of the Employment Act 1980. The court reasoned that although the Appellant contravened a workplace rule that she knew or was reasonably expected to know, the rule in question **"was not consistently applied by the employee."**³ The court came to this conclusion on the basis of an assumption that one Angela Mlipha, who was a colleague of the Applicant at First National Bank and who actively assisted her in the endeavors to prevent the garnishee order being given effect to, was not charged with an offence. The court made this observation:-

"If anything, Angela Mlipha should have been charged and disciplined just like the Applicant because she was equally guilty of the same infraction. Instead, nothing was done to her....."⁴.

[5] This inconsistency, observed the court, was in breach of the parity principle⁵, with the result that despite that her conduct was undoubtedly dishonest, her dismissal could not be said to be in accordance with the requirements of **"fairness and equity, when all the relevant features of this case....are considered"**⁶, and it came to the conclusion that the dismissal was substantively unfair. On the procedural aspect, the court found that there was full compliance with the requirements of procedure. In the result the Respondent was awarded notice pay, additional notice pay, severance pay and eight months compensation for unfair dismissal, all totaling E204, 203.97.

³ Judgment, at para 30

⁴ Judgment, at para 30.

⁵ See para....of this judgment

⁶ Judgment, at para 36

APPEAL

- [6] The Respondent appealed upon the following main grounds:-
- 6.1 that the *court-a-quo* having found the Applicant guilty of dishonesty, erred in then finding that the dismissal was unfair only because another employee who was a participant in the misconduct was not charged and disciplined.
 - 6.2 the parity principle was not pleaded by the Applicant as a ground upon which her claim was based.
 - 6.3 the employer having proven that the employee's dismissal was for a reason contained in Section 36 of the Employment Act, the court did not have due regard to Section 34 (1) and Section 33(7) and 33(8) of the same Act, and wrongly awarded severance pay, notice pay and additional notice pay.
- [7] It is convenient to first deal with the issues raised in the appeal before dealing with the cross-appeal. It is clear from the judgement of the trial court that the Appellant's case for dishonesty was unassailable, and that the turning point came when the Honourable court ventured into the principle of parity. This principle advocates that workers who commit the same or similar offences must be treated alike⁷, although they need not receive identical sanctions, which, of course, must take into account their individual circumstances. On the facts before the *court-a-quo*, as was pointed out by the court in the judgment, the import of this principle is that Angela Mlipha should also have been charged with an offence and put to discipline. It is common cause between the parties that the principle of parity was not pleaded by the Applicant as one of the grounds upon which its case of unfair dismissal was based. It is also common cause that, unavoidably, it was not

⁷ His Lordship, quoting Mogoeng AJA in NUM and ANOTHER v ACOAL COLLIERY t/a ARNOT COLLIERY & ANOTHER [2000] 8 BLLR 869 (LAC) at page 875 para 19, states that the principle of parity is intended to prevent "selective punishment or dismissal and to ensure that like cases are treated alike" (at para 31 of the Judgment)

canvassed and argued at the trial. It was brought into the equation by the Honourable Judge *mero motu*.

[8] At paragraph 29 of the judgment His Lordship puts it in this manner:-

“There is however this one issue that keeps lingering in the Court’s mind; that of Angela Mlipha, the Applicant’s colleague who was instructed by the Applicant to negotiate with Immanuel that the garnishee not be delivered.....In fact, she played a significant role in ensuring that the garnishee was diverted from its intended recipient, the Paymaster. Angela was therefore as culpable as the Applicant in this matter. However, there is no evidence before court that she was charged and disciplined.....except that she was only called by the Applicant as her witness in the disciplinary hearing.”

[9] There is no doubt that this consideration was procedurally incorrect. What should have happened is that upon perceiving this aspect as relevant and sufficiently important, the court ought to have called upon the parties to canvass it fully⁸, in one form or another. The Industrial court being a court of equity, there could well be room for going that route. But to decide the outcome on the basis of an assumption that Angela Mlipha was not charged was, with respect, unjustifiable in the circumstances. Not only because the employer was not afforded a chance to deal with it, but also because it is arguable whether or not non-compliance with the parity principle should have the effect of exonerating a worker who is shown by evidence to have violated a workplace rule. It is needless, however, to point out that such discriminatory conduct on the part of an employer is to be

⁸ In the case of MAKHOSAZANE EUNICE SACOLO AND ANOTHER v JUKHI JUSTICE SACOLO AND TWO OTHERS (1403/16) [2019] SZHC 166, 30th August 2019, a full bench of the High Court refrained from pronouncing on an important legal question for the sole reason that it was not canvassed in the papers and in legal arguments.

frowned upon and, in the absence of a plausible explanation, deserves censure. It is this court's considered view, therefore, that the trial court having found that the Applicant was guilty of dishonesty, with respect it erred to then conclude that the dismissal was substantively unfair for want of compliance with the principle of parity.

- [10] The one other ground of appeal is captured at paragraph 6.3 of this judgment. The Respondent was dismissed for a reason contained in Section 36 of the Employment Act 1980, that being dishonestly, which is specifically mentioned in 36 (b) as a fair reason for terminating employment. In this ground of appeal the Appellant is submitting that this being the case, the court should then have had regard to Sections 33 (7) and 33 (8) of the same Act.

10.1 Section 33(7), reads as follows:-

“Nothing in this section shall prejudice the right of the employer to dismiss an employee summarily for just cause and any employee who is dismissed for just cause shall be paid the wages due to him up to and including the date of such dismissal.”

10.2 Section 33(8) reads as follows:-

“An employee shall not be dismissed without notice unless the reasons for his dismissal are such as to warrant the immediate cessation of the employer/employee relationship and where the employer cannot be expected to take any other course.”

- [11] The effect of these sub-sections read together, is that on the basis of the finding of dishonesty the Respondent was liable to be dismissed summarily and paid only wages that were due at the time of dismissal

and would not be entitled to notice. The evidence at the disposal of the trial court does not show that any wages were due to the Respondent at the time of dismissal, and because on the basis of just cause she would not be entitled to notice, the net effect of the Appellants argument is that the Respondent was not entitled to any of the awards that were made by the Honourable Court in its judgment.

[12] Subject to the outcome of the cross-appeal, the Appellant's grounds of appeal would succeed.

CROSS-APPEAL

[13] The cross-appeal is on two main grounds. The first one is that the trial court erred in not ordering the reinstatement or re-engagement of the Respondent in terms of Section 16(1) or 16 (2) of the Industrial Relations Act 2000 as amended. The second one is a broad, unbridled challenge on the legality or validity of the garnishee order and the manner in which it was purportedly served upon the Appellant.

[14] In view of the conclusion that we have come to above, that the dismissal was in fact fair and justifiable in the circumstances of the case, not only in terms of Section 36 of the Employment Act 1980 but also within Section 33 (7) and Section 33 (8) of the said Act, it follows that the need to exercise discretion whether to order reinstatement or re-engagement does not arise. It therefore remains to deal with the challenge on the validity of the garnishee order and the manner in which it was purportedly served.

[15] Before we get to the legality/validity of the garnishee order and the manner in which it was served, and by whom, we need to remind ourselves that the charge that was faced by the Respondent was one of dishonesty, the particulars being that she **“was given a garnishee**

order in respect of herself to affix a stamp and she never submitted it to the Human Resources officials for normal processing which to date remains unfound.” At the hearing this came to be described as **“diverting”** the order, with the result that deductions upon her salary were not effected as they would have, had the order been processed in the normal way.

- [16] To our understanding, dishonesty is a state of mind as evinced by the conduct of that particular person. On the facts in *casu* the court found, and rightly so, that the Respondent did become aware that there was a garnishee order in respect of her, and that having become aware of this fact she did not bring the order to the attention of the Paymaster who would, in the normal course of events, ensure that it was complied with. Instead, she put in motion an endeavor to ensure that the order was not put through the appropriate channels that would culminate in its enforcement. Her reason for this, as admitted by herself under cross-examination, was that this would adversely affect her in accessing an educational loan in the bank. Through the instrumentality of Angela Mlipha, she sought to dissuade one Emmanuel who had come to the bank to serve the order, from doing so. Clearly, she did all that was in her power to ensure that the order was not processed in the normal way. The *court-a-quo* correctly found that this conduct amounted to dishonesty. The submission on behalf of the Respondent that the Appellant did not suffer any **“form of loss”** as a result of this is, with respect, misplaced. Dishonesty, unlike fraud, need not result in loss. It is sufficiently adverse to the Appellant that it was, by letter allegedly from a firm of attorneys, taken to task for not complying with the court order and this was, apparently, what precipitated an investigation of this issue by the Appellant.

VALIDITY OF THE COURT ORDER

[17] There is no doubt in our minds that a lot of things were wrong with the garnishee order and the net effect is most probably that it was fraudulently obtained. In our jurisdiction it is not possible to seek and obtain a garnishee order within a period of two hours, never mind that two hours is barely enough to travel the round trip between the base of the law firm in Manzini and the Appellant's head office in Mbabane. But there are established procedures for challenging an order of court, and it does not serve the Respondent to argue that the order was invalid and therefore to not process it does not constitute an offence. The trial court was satisfied that the order was received by the Appellant bank. If the person that served the order did not have the authority to do so this, and many other issues, may constitute a good case for the rescission of the order, but this matter is not about that. It is about the baviour of the Respondent who, it is clear, believed that the order was valid and capable of enforcement and forestalled the enforcement, taking undue advantage of her position in the payroll department of the Appellant.

[18] There is therefore no legal basis upon which the Respondent's grounds of appeal can succeed. And for the avoidance of doubt we mention that having come to the conclusion that the Respondent was fairly dismissed, she is not entitled to any of the awards that were made in her favour by the *court-a-quo*. We therefore enter the following orders:-

18.1 The Appeal succeeds.

18.2 The cross-appeal is dismissed

18.3 No order as to costs.

MLANGENI AJA

I agree: _____

MAPHANGA AJA

I agree: _____

SHABALALA AJA

For The Appellant: Mr. M. Sibandze

For The Respondent: Ms. Mkhabela