IN THE INDUSTRIAL COURT OF APPEAL

JUDGMENT

Case No. 2/2020

In the matter between:

NKOSINATHI DLAMINI **APPELLANT**

And

NDZ CONSULTING COMPANY LTD **RESPONDENT**

Neutral Citation: *Nkosinathi Dlamini vs NDZ Consulting Company Ltd [2/2020] [2020] SZIC 21 (8 April 2020)*

Coram: **M. R. FAKUDZE AJA, C.S. MAPHANGA AJA, and M. S. LANGWENYA AJA**

Heard: **20 April 2020**

Delivered: **8 May 2020**

Summary: The appellant was dismissed from employment for infringing rules and policy of his employment contract-The employer failed to apply provisions of disciplinary code in dismissing the employee instead of giving him a warning-Effect of failure by employer to abide by its own disciplinary code-Court *a quo* erred in

finding that dismissal was procedurally unfair-Dismissal was substantively unfair-Failure by respondent to issue a first and second warning in line with provision of the Code amounted to substantive unfairness-Substantive unfairness discussed-Compensation awarded.

M. LANGWENYA AJA

[1] In this matter, the appellant appeals against the judgment of the Industrial Court delivered on 6 March 2020.

[2] The appellant was since 1 February 2013 until 7 April 2015 employed as a call centre agent by the respondent-a private company incorporated and registered in accordance with the laws of the Kingdom of eSwatini and who is the respondent in this matter.

[3] During the time of his employment by the respondent, the appellant earned a sum of E6,945.00 (six thousand nine hundred and forty five Emalangeni) per month and was attached to MTN Swaziland.

[4] The incident that gave rise to this appeal occurred on 9 March 2015 at appellant's duty station at MTN Swaziland Call Centre, eZulwini. As a call

centre agent, the appellant's main duty was to assist MTN Swaziland customers with queries raised by customers by calling MTN number 922.

[5] While performing his duties on 9 March 2015, the applicant attended to a customer who had a query relating to her data. It is alleged that the appellant put the customer on hold and attended to a personal call using his private cell phone much against the rules of his employer. This alleged misconduct resulted in the appellant being served with an invitation to attend a disciplinary hearing on 19 March 2015. The charges were couched in the following terms:

1. Gross Misconduct

In that on or about the 9th March 2015 whilst on duty at MTN Swaziland as a call centre agent you wrongfully put a data query customer on hold and attended to a personal enquiry using your personal cell phone. This is against the rules and regulations of our client MTN Swaziland known to you and constitutes bad customer service.

2. Breach of MTN Swaziland Information Security Policy and Rules

(a) In that on or about the 9th March 2015 you entered the MTN Swaziland Call Centre with a cellphone without the authority of MTN Swaziland and in the full knowledge that this is against MTN's security rules.

(b) In that on the 9th March 2015 you divulged information obtained from the MTN call centre Information system on a stolen handset to another person without the authority of MTN Swaziland and in the full knowledge that this is against MTN's security rules.

[6] Following the conclusion of the disciplinary hearing, the appellant was found guilty of gross misconduct and breach of MTN Swaziland information security policy and rules. He was accordingly dismissed.

[7] Aggrieved by the finding of the internal disciplinary hearing conducted by the respondent, the appellant reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. A certificate of unresolved dispute was issued by CMAC following that the parties failed to have dispute resolved at CMAC.

[8] On 3 October 2016 the appellant filed his particulars of claim in terms of the Industrial Relations Act, 2000 for the determination of the issues in dispute between him and the respondent at the Industrial Court.

[9] Before the Industrial Court, the appellant pleaded not guilty to all the charges and denied all the charges preferred against him while giving evidence in support of his case. The respondent led the evidence of three witnesses and supplemented this with documentary evidence in proof of its case.

[10] It was the case of the appellant in the Industrial Court that he did not use his personal cellphone to call his relatives while on duty on that day. In his defence, the appellant further told the Court that he was unaware of the rules and regulations he was alleged to have breached.

[11] It was the case for the respondent that the call that cut into the conversation between the appellant and the data query customer was assessed by the

quality assurance department and was found to have been badly handled resulting in it being zero rated. It was the evidence of the respondent that a zero rated call amounted to misconduct.

[12] The first witness for the respondent RW1 Khulile Dlamini explained that before a call centre agent could put a customer on hold, he had to seek permission from the customer to do so and explain to the customer why it is necessary to put him on hold. In most cases, a call centre agent will put a customer on hold in order to consult on an issue queried by a customer. It was RW1's evidence that all customer calls are evaluated and rated from zero to hundred percent. If a call is zero rated, the call centre agent is subjected to a disciplinary hearing.

[13] It was the evidence of the respondent that training of call centre agents on company policies and regulations is oral and they are also given booklets of the rules. RW2 Ernest Magagula told the Court that he is the operations manager of the respondent. It was his evidence that employees were called to a meeting an informed that a zero rated call attracts a dismissal. It was his evidence that during the disciplinary hearing no witness was called to give evidence in this regard but that reliance was placed on a tape and the transcribed record presented to the Industrial Court.

[14] It was the evidence of RW2 that the rating of the call was done at MTN and that he did not consult with the person who conducted the rating of calls at

MTN. RW2 further admitted to court that before Court there was no evidence of how the rating of calls was done and how the score was arrived at. The respondent was told by MTN that it was a zero rated call.

[15] RW3 is Cebile Fakudze and was a call centre supervisor at the time. She listened to the recording and came to the conclusion that the call was not handled properly. According to RW3, the appellant in his written explanation apologized for his actions in mishandling the customer call.

[16] Concerning Count two (a) the appellant is alleged to have entered MTN Swaziland call centre with a private cellphone without authority of MTN Swaziland and with full knowledge that it was against MTN security rules. It was RW3's evidence that she saw the appellant having his personal cellphone and talking to another person on the other side and addressing the other person as *mkhulawami*. RW3 did not disclose this information to the respondent-ostensibly because she did not know that the appellant was going to commit an offence.

[17] Following answers RW3 gave during cross examination pertain the second count (a), the Industrial Court reached the conclusion that her evidence was clearly false and an afterthought.

[18] With regard to count 2(b) where it was alleged that the appellant divulged information obtained from the MTN call centre information system about a stolen handset to another person without the authority of MTN Swaziland contrary to MTN security rules, RW3 conceded during cross examination that the appellant did not divulge any information. Before the Industrial Court there was no such evidence. Consequently, the Industrial Court concluded that the respondent failed to prove the commission of the charge in count 2(b).

[19] The reason the appellant was accused of attending to a personal enquiry was because he was heard addressing the caller as his sister in law. An assumption was made that he was talking to a relative. The appellant stated that he was being respectful to the caller not that she was his relative. The version of the appellant was not disputed in so far as the person to whom the appellant was addressing was not called to testify.

[20] The appellant told the Court that the sister in law call that came in while he was attending to the data query call was a return call. According to the appellant, a call centre agent may put a caller on hold if there is need to do so. According to a transcribed record handed to the Industrial Court, it reflects that the appellant did interrupt the data query call and attended to another customer. The record does not show that the appellant followed the procedure of first asking to put the customer on hold.

[21] When confronted with this evidence that his conduct was unacceptable in terms of standards, rules and regulations of MTN Swaziland on how to deal with a query customer, the appellant's defence was that he was not trained on those rules and regulations so he was unaware of them. The Court found that it was unlikely that the applicant could not have attended an induction course or training to familiarize him with the regulations and policies of the new environment he was now employed at.

[22] It was urged on behalf of the appellant that even if there was a lapse in the manner he handled the call in question, the decision to dismiss was too harsh especially as a first offender. In response, respondent's witnesses told the Court that although the sanction of dismissal for a first offence is not reflected in the rules or code of conduct, the call centre agents were verbally informed that a zero rating would attract a dismissal. The Court's conclusion is telling as it stated that the respondent's witnesses were making the rules to fit the case.

[23] In failing to call the officer who conducted the assessment and grading of the conversation, the respondent failed to discharge the burden of proving the zero grading which was disputed by the appellant at the Industrial Court.

[24] The Industrial Court concluded that appellant's conduct of attending to another customer whilst he was assisting another customer was an infraction of the rules of courtesy that the appellant was expected to observe when

dealing with MTN's customers. Respondent's Code of conduct provides that a first offence involving such an infraction attracts the sanction of coaching and a final written warning. The Court rejected respondent's version that the penalty for poor customer service was upgraded verbally from coaching and final written warning to that of dismissal for a first offence.

[25] The Court concluded that appellant's dismissal was procedurally unfair.

The grounds of appeal and the grounds opposing appeal

[26] The grounds of appeal are contained in appellant's notice of appeal and are five in total. The first ground of appeal relates to the finding that the summary of the Court's judgment reflects that the appellant's dismissal was not only procedurally unfair in as much as it was substantively unfair. The second ground of appeal is joined at the hip with the first ground of appeal as the appellant argues that the Court *a quo* erred in law and in fact in holding that the dismissal of the appellant was only procedurally unfair. The third ground of appeal is that the Court *a quo* erred in awarding compensation of two months' wages to the appellant based on the fact that appellant's dismissal was only procedurally unfair. The fourth ground of appeal is that the Court *a quo* fell into error when it failed to award twelve months' compensation or such higher compensation and costs seeing that appellant's dismissal was not just procedurally unfair but was in fact substantively unfair. The last ground of appeal is that the Court *a quo* erred

in holding that the appellant infringed the respondent's rules in relation to the first count.

[27] I will, in the course of this judgment return to the grounds of appeal.

[28] The respondent opposed the appeal on the grounds that the appellant failed to comply with provisions of Rule 21 of the Rules of the Industrial Court of Appeal (ICA) whose provisions are peremptory in the noting of an appeal of a matter from the Industrial Court. It was stated by the respondent that the appellant failed to avail the complete judgment which is the subject matter of the appeal. This submission relates to the fact that in the judgment concerned page 20 was missing. The next ground of the respondent was that the appellant failed to have the record of proceedings certified by the Registrar of the Industrial Court. For these reasons, the respondent contends, the record of proceedings is not in compliance with the rules of this Court. It was a ground of respondent's appeal that the appeal is not in terms of Section 19(1) of the Industrial Relations Act (IRA) as there was no record- and therefore no evidence- before Court on the basis of which the Court may adjudicate the appeal.

[29] It is clear that the issues which this Court must resolve are:

a) Whether the appeal is properly before this Court and if so;

b) Whether the Industrial Court was correct to arrive at the decision it did by finding that appellant's dismissal was only procedurally unfair as opposed to finding that the dismissal was substantively unfair; and

c) Whether the Court *a quo* was correct not to award twelve months' compensation or such higher compensation and costs as a result.

[30] The questions that we are required to determine are the questions set out in the immediate paragraph above of this judgment. I find it appropriate to, albeit briefly, before I consider the issues which we are called upon to decide in this appeal, briefly set out the legal principles governing those aspects.

The applicable legal principles

[31] Rule 21 of the Industrial Court of Appeal Rules[1] sets out how a record on appeal should be prepared and also that such a record must be certified by the Registrar of the Industrial Court as correct within a month of the date of noting an appeal. The language used in Rule 21 is peremptory in nature as it provides that the appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) and shall, within one month of the date of noting an of the appeal, lodge a copy thereof with the Registrar of the Industrial Court for certification as correct[2].

[1] 1997

[2] Rule 21 (1) of the Industrial Court of Appeal Rules, 1997.

[32] The Judgment from the Industrial Court was handed down on 6 March 2020 and the notice of appeal was filed on 9 March 2020 followed by a certification by the Registrar signed on 19 March 2020. On the record of pleadings under Industrial Court Case number 309/2016, there is the Registrar's certificate couched in the following terms:

> **'I certify that the record of pleadings under Industrial Court case number 309/2016 is a true record of proceedings in the stated case number.'**

[33] The above certification bears the Registrar's stamp of 19 March 2020 and is signed. On the face of the record, it is therefore incorrect that the appellant did not comply with the aspect relating to certification of the record by the Registrar. And even if there was such a lapse-which is denied-the respondent did not complain about being prejudiced in this regard.

[34] It was also argued on behalf of the respondent that the appellant did not file the judgment in its entirety as page 20 of the judgment was missing. The appellant undertook to provide the missing page to the Court and to the respondent and stated that there was a misprint of the judgment in this regard. Again, the respondent did not complain about being prejudiced in this regard.

Substantive fairness

[35] The Employment Act[3] as well as the Code of Practice of the IRA reinforces the well-established principle that dismissals of employees must be both substantively and procedurally fair[4].

[36] Substantive fairness means that a fair and valid reason for the dismissal must exist. In other words, the reasons why the employer dismisses an employee must be good and well grounded; they must not be based on some spurious or indefensible ground[5]. This requirement entails that the employer must, on a balance of probabilities, prove that the employee was actually guilty of misconduct or that he contravened a rule. The rule that the employee is dismissed for infringing, must be valid and reasonable. Generally speaking, a workplace rule is regarded as valid if it falls within the employer's contractual powers and if the rule does not infringe the law or a collective agreement.

[37] The requirement of substantive fairness furthermore entails that the employer must prove that the employer must prove that the employee was or could reasonably be expected to have been aware of the existence of the rule. This requirement is self- evident, it is clearly unfair to penalize a person for breaking a rule of which he has no knowledge of.

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[3] Section 35(2) states that 'no employer shall terminate the services of an employee unfairly.'
[4] Schedule Code of Practice (Section 109) Section 43 'It is a basic principle that an employee should not be dismissed from a job without reason....Every employer should ensure that fair and effective arrangements exist in dealing with disciplinary measures...
[5] Pepstores (Namibia) (Pty) Ltd v Iyambo & Others 2001 NR (LC).

A fair pre-dismissal hearing

[38] Apart from complying with the guidelines for substantive fairness an employee must be dismissed after a fair pre-dismissal hearing was conducted. The requirements for a fair pre-dismissal hearing were set out in the case of *Mahlangu v CIM Deltak*[6] as follows: the right to be told of the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the hearing; the right to some form of representation; the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty), he should be told the full reasons why; the right to have previous sentence considered; the right to be told the penalty imposed (for instance termination of employment) and the right to appeal. Although these principles are not absolute rules, they should be regarded as guidelines to show whether the employee was given a fair hearing in the circumstances of each case[7].

[39] From the above restatement of the legal principles it can be concluded that in order to establish whether dismissal of the employee was in accordance with the law, the Court must be satisfied that such dismissal was both procedurally and substantively fair.

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[6] (1986) 7 ILJ 346 (IC)

[7] Bosch v THUMB Trading (Pty) Ltd (1986) 7 ILJ 341 (IC).

Was appellant's dismissal substantively unfair?

[40] It is important to state that in his submissions, Mr. Madzinane for the respondent conceded that appellant's dismissal was substantively unfair.

[41] The Industrial Court found the dismissal of the appellant was procedurally unfair but substantively fair. The Industrial Court found that the appellant was guilty of misconduct because he contravened his employer's rules and regulations regarding putting a customer on hold. RW1 and RW3 gave evidence to the effect that all call centre agents were trained on MTN policies relating to dealing with customers. The Court reasoned that it was unlikely that the applicant had not attended an induction course about the policies and ethics of his new work environment.

[42] It is my considered view that the respondent need not have produced the rule or policy to prove that the appellant was wrong to put a customer on hold. It is sufficient, in my view that there was evidence from respondent's witnesses that the appellant was trained on the rules he was found to have infringed.

[43] The second leg of the argument is whether or not the termination of appellant's contract of employment without issuing him with a first and second warning in line with respondent's disciplinary code amounted to substantive defect as opposed to a procedural defect. It is proper to think that

when the respondent employer put in place the disciplinary code, it also intended to be bound by its contents[8]. Consequently, the failure by respondent to issue a first and second warning in line with its code amounted to a departure from the provisions of the Code and was therefore substantively unfair; but for the disregard of the disciplinary code, the appellant's services would not have been terminated as he would have been given a first and second warning instead.

[44] Since by law the disciplinary code between employer and employee is binding between the parties, failure by the employer to apply the sanction that accords with the disciplinary code amounted to substantive unfairness and not procedural unfairness. Put differently, when the employer opted to dismiss the employee against the provision of its disciplinary code to the contrary, that is a matter of substance as opposed to procedure.

[45] The record shows that the appellant was charged under item 6 of the Code for the misconduct of 'bad customer service'. This type of misconduct attracted a warning of a first and second infringement. It is only on the third instance that an employee's services could be lawfully terminated upon a finding of guilt. It was not disputed that the incident referred to under the first count was a first incident which involved the appellant. The appellant was supposed to be given a first warning. He was not. As a matter of substance, the appellant was supposed to have not been dismissed. The issue

[8] Gugu Fakudze v The Swaziland Revenue Authority and 3 Others (08/2017) 2017 SZICA 02 (30 October 2017) at paragraph 31.

of an appropriate sanction in this regard is more substantive than it is procedural because it incorrectly brought to an end appellant's contract of employment with the respondent.

[46] Failure of the respondent to apply the appropriate sanction had nothing to do with procedural requirements for a fair hearing as much as it led to the respondent misapplying the law by failing to warn the appellant that any future infringement of the rules will lead to a second warning after which a dismissal may follow.

[47] Applying the legal principles I have outlined above to the facts of this case and the reasoning of the learned Judge *a quo*, the conclusion is inescapable in my view, on a holistic view of the evidence that, in arriving at its decision, the Court *a quo* erred in finding that failure to apply provisions of the disciplinary code amounted to procedural unfairness.

Appropriate relief

[48] Having concluded that the appellant's dismissal was substantively unfair it remains to consider the relief that may be granted by this Court.

[49] This Court is entitled to confirm, amend or set aside the decision of the Industrial Court…according to law and fairness[9].

[50] I must determine what is fair and reasonable in the circumstances of this case. It was submitted that the Court *a quo* did not exercise its discretion fairly and reasonably in awarding compensation of only two months' wages given that the appellant was illegally put out of work for a period of about two years when he has a family to look after.

[51] Where the Court finds that the dismissal is unfair, the IRA provides that it can order the employer to reinstate the employee; re-engage the employee or order compensation[10]. The compensation so awarded must be just and equitable in all circumstances[11]. In determining the amount of compensation, the courts have taken into account the extent to which the claimant's own conduct contributed to the dismissal. The Courts have also taken into account the view that compensation must not be calculated in a manner aimed at punishing the employer, or at enriching a claimant because it is awarded based on the principle of *restitution in integrum*. I am bound to exercise discretion and to do so within the limits imposed by the Act.

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[9] See Section 21(3) of the Industrial Relations Act, 2000.
[10] Section 16(1) of the Industrial Relations Act, 2000.
[11] Section 16(6) of the Industrial Relations Act, 2000.

[52] Compensation is not the equivalent of hitting a jackpot and or receiving a gratuity. In its ordinary meaning the term envisages an amount to make amends for a wrong which has been inflicted. The primary enquiry must accordingly be to determine what that loss is. The loss in this case is the remuneration over the period of the unfair dismissal of the appellant and it is that loss that must be made good. There is evidence that the appellant is now employed on a temporary contract which endure on a three months' basis by Swazi Mobile.

[53] The Industrial Court ordered respondent to pay the appellant an amount of E13, 890.00 being compensation equivalent to two months' pay as a fair award. We take the view that since the appeal has succeeded the appellant is entitled to more than the equivalent of two months' wages as compensation.

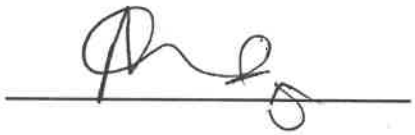
[54] In the interest of justice, fairness and equity, compensation equivalent to six months' pay is a fair award. The six months' pay is inclusive of the two months' pay that was ordered by the Industrial Court.

[55] In the result:

1. The appeal succeeds.
2. The respondent is ordered to pay the appellant an amount of E27,780.00 as compensation for the unfair dismissal.

3. Costs of suit.

M. LANGWENYA AJA



I agree: **M.R. FAKUDZE AJA**

I agree: **C.S. MAPHANGA AJA**

For the Appellant: Mr. B.S. Dlamini of B.S. Dlamini and Associates

For the Respondent: Mr. S. Madzinane of Madzinane Attorneys