

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 512/2007

In the matter between:

MUMCY NTOMBI MAZIYA

Applicant

and

THE TEACHING SERVICE COMMISSION

1st Respondent

THE UNDER – SECRETARY, MINISTRY

OF EDUCATION

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Neutral citation: *Mumcy N. Maziya v The Teaching Service Commission & Others (512/2007) [2018] SZIC 66 (July 06, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and P.S. Mamba
Nominated Members of the Court)

Heard submissions: 15/06/18

Delivered judgement: 06/07/18

SUMMARY---Labour Law---Applicant charged with professional malpractice and misconduct for allowing a subject teacher into the examination room and assisting pupils with answers---Applicant disciplined and found guilty and dismissed from service---No evidence that Applicant was served timeously with the charges---No evidence that Applicant was informed of the reasons for the decision---Applicant not afforded the opportunity to appeal---No evidence that Applicant was given the copy of the documentary evidence used against her at the hearing.

Held---There was sufficient evidence that the Applicant committed the offence. The employer however failed to follow a fair procedure in handling the disciplinary hearing. The dismissal of the Applicant was therefore procedurally unfair.

JUDGEMENT

1. The Applicant was dismissed from the teaching profession by the 1st Respondent on grounds of professional malpractice and misconduct.
2. The Applicant did not accept the decision of the 1st Respondent and she reported the matter to the Conciliation, Mediation and Arbitration Commission (“CMAC”) as a dispute. The parties tried to resolve the dispute by conciliation but they were unsuccessful. The Applicant thereafter filed the present application before the Court for the determination of the unresolved dispute.

3. The Applicant's application was opposed by the 1st Respondent which duly filed a Reply to the Applicant's application. Thereafter the Applicant filed her Replication.
4. The Applicant in her papers stated that her termination by the 1st Respondent was unlawful, unfair and unreasonable in all the circumstances. She stated that she was not given the opportunity to present her defence to the charge. She also stated that no evidence was presented to prove the allegations against her.
5. The 1st Respondent denied that the dismissal of the Applicant was unfair or unlawful. The 1st Respondent stated in its Reply that the Applicant was dismissed after she was found guilty of professional malpractice and misconduct as she allowed subject teachers to assist candidates during an examination.
6. The Question for the Court to decide is whether or not the 1st Respondent was able to prove on a balance of probabilities that the Applicant was guilty of the charges of professional malpractice and misconduct that she was facing. The burden of proof is on the 1st Respondent to prove that the Applicant committed the charges preferred against her and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant. **(See:- Section 42 (2) of the Employment Act N0.5 of 1980 as amended.)**

7. The evidence before the Court revealed that the Applicant was first employed as a teacher in 1986. In 1998 she was promoted to the position of Head teacher at KaKholwane Primary School. As Head teacher the Applicant was also the Chief Invigilator during the writing of external examinations at the school.
8. During November 2005, the Grade 7 pupils were writing the Standard 5 external examination at the school. According to the Applicant whilst the pupils were writing their Mathematics Paper II, they all raised their hands and had a question pertaining to the same question in the script. She said the class was being supervised by a certain Mr. Sukati. She said Mr. Sukati asked her to call the Mathematics teacher, Ms. Phumlile Dlamini to come and look if the question was properly framed. The Applicant said Ms. Phumlile Dlamini looked at the paper and advised the pupils to proceed to other questions. Ms. Phumlile Dlamini took one script and went out of the examination room with it to the class that she was teaching at that time. At that moment some officers from the Examinations Council of Swaziland showed up. The team of officers was led by a certain Mr. Sihlabela. They got into the examination room, counted the scripts and found that they were short by one. The Applicant went to fetch this script from Ms. Phumlile Dlamini.
9. Ms. Phumlile Dlamini had answered one question. The Examinations Council of Swaziland officers made their investigations but found that the pupil's answers were not similar to that of Ms. Phumlile Dlamini. The officers went away on that day but later came back when schools

were closed to conduct further investigations. They interviewed three pupils who sat for the examinations and also some teachers. Mr. Sihlabela prepared a report. The report showed that some subject teachers were allowed to get into the examination room and assisted the pupils with some answers. The Examinations Council of Swaziland withheld results for that year. All the pupils that sat for the examination in that year were affected and did not get their Grade 7 results.

10. The 1st Respondent led the evidence of two witnesses before the Court. RW1, William Lokotfwako, told the Court that he was a member of the disciplinary hearing tribunal before which the Applicant appeared. He told the Court that there were numerous postponements before the matter eventually proceeded on 24th July 2007. He said the Applicant pleaded not guilty to the charge. He told the Court that the Minutes of the disciplinary hearing were a true reflection of what transpired during the disciplinary hearing of the Applicant. RW1 denied that the Applicant got to know about the charges on the day of the disciplinary hearing. RW1 agreed that two teachers appeared before the Teaching Service Commission (TSC) on 24th July 2007, being Ms. Phumlile Dlamini and the Applicant. RW1 said during the hearing it became clear that they had committed the offence and they were given an opportunity to go out and write letters of apology. RW1 said the minutes of the hearing were taken by the Executive Secretary, Mr. E.V. Zungu.

11. The last witness for the Respondent was RW2, Phumzile Manana. She told the Court that she is a former student of KaKholwane Primary School. She was part of the students that sat for the standard five external examination in November 2005. She told the Court that when they were writing Mathematics Paper II, their class teacher Ms. Phumlile Dlamini came in and took one script and went outside and later returned having written the answer to the question that was giving the pupils a tough time.

12. RW2 told the Court that Ms. Phumlile Dlamini had written the answer on pieces of paper and gave each student the answer. RW2 said the Applicant was present and was sitting next to the door. At that moment the motor vehicle from the Examinations Council of Swaziland approached the school. The Applicant quickly warned Ms. Phumlile Dlamini who in turn instructed the pupils to bring back the answer papers. Ms. Phumlile Dlamini then went out just before the motor vehicle arrived at the school. The pupils after finishing writing the examinations went home. Whilst at home the Inspectors from the Examinations Council of Swaziland came back and interviewed three pupils including RW2. RW2 told the Court that the results were not released by the Examinations Council of Swaziland. She told the Court that as she did not get the results, she was unable to proceed to Form 1. She said she is presently staying at home doing nothing.

13. ANALYSIS OF THE EVIDENCE:-

The Applicant did not dispute the evidence that she allowed a subject teacher, being the Mathematics teacher, Ms. Phumlile Dlamini to get into the examination room where the pupils were writing her subject, Mathematics Paper II. It was also not in dispute that the inspectors from the Examinations Council of Swaziland came to the school on that same day when Ms. Phumlile Dlamini had been allowed to get into the examination room. The Applicant did not deny that as the Head teacher at the school, that she was the Chief Invigilator. The Applicant admitted that Ms. Phumlile Dlamini was also charged and was dismissed by the 1st Respondent.

14. During cross examination, the Applicant admitted that subject teachers are not allowed to come into the examination room. She admitted that Ms. Phumlile Dlamini did get inside the examination room to see the invigilator. She also admitted that Ms. Phumlile Dlamini did take the script outside of the examination room. The Applicant was referred to the checklist for invigilators (page 36 of Book of Pleadings Volume 2). The Applicant denied knowledge of this document. She said she first saw this document at her attorney's office. In paragraph 6 of the document from the Examinations Council of Swaziland, there is a prohibition from removing a script. The paragraph appears as follows:-

“6. Ensure that no question paper is removed from the examination room.”

15. The evidence by RW2 that the Applicant was sitting next to the entrance door when Ms. Phumlile Dlamini came into the examination room was not disputed. Further, the evidence by RW 2 that Ms. Phumlile Dlamini assisted the pupils by giving them answers on a piece of paper was not successfully challenged during cross examination.
16. The charge against the Applicant was that as Chief Invigilator of final examinations she knowingly and wrongfully allowed Ms. Phumlile Dlamini and Mr. Magagula into the examination room to assist candidates in answering examination questions. Before the Court there was no evidence that the Applicant did give any answer to any student during the examination. There was however evidence that she did allow Ms. Phumlile Dlamini, a mathematics subject teacher to get into the examination room to assist the pupils in answering the examination question.

RW2 told the Court how Ms. Phumlile Dlamini assisted the pupils with the answer to the question. RW2 told the Court that when Ms. Phumlile Dlamini was giving them the answers on a piece of paper, the Applicant was sitting next to the entrance door. RW2 told the Court that when the motor vehicle from the Examinations Council of Swaziland came, it was the Applicant who warned or alerted Ms. Phumlile Dlamini. Ms. Phumlile Dlamini then instructed the pupils to bring back the pieces of paper that had the answer to the examination question. Ms Phumlile Dlamini then went out of the examination room before the motor vehicle parked at the school premises.

17. During cross examination, RW2 was able to come out unscathed. She maintained the version that she narrated in chief. RW2 was an honest and reliable witness. Her demeanor in the witness stand was that of a decisive and direct witness. She readily conceded if she had made a mistake or forgotten some details. She attributed that to the passage of time since the incidence occurred.

18. The Court will therefore come to the conclusion that the following facts were proven;
 - 18.1 The Applicant was the Head teacher of KaKholwane primary School in 2005.

 - 18.2 Ms. Phumlile Dlamini was a SiSwati and Mathematics teacher at the school.

 - 18.3 RW2, Phumzile Manana was one of the pupils who sat for the Standard Five external examination in November 2005 at the school.

 - 18.4 The pupils who sat for the Standard Five examination in that year, November 2005, did not get their results because the investigations by the Examinations Council of Swaziland revealed that there was a malpractice during the examination.

 - 18.5 The Applicant as the Head teacher was the Chief Invigilator at the school. The Applicant allowed the Mathematics subject

teacher, Ms. Phumlile Dlamini to get into the examination room to assist the pupils with an answer to a mathematics question when the pupils were writing Mathematics Paper II.

19. The Applicant denied knowledge of the checklist for invigilators from the Examinations Council of Swaziland, (**Annexure TSC 5, page 36 of the Book of Pleadings volume 2**). The employer is not required to prove actual knowledge of the rule that was breached by the employee. The employer is required to satisfy the Court that the rule exists and that the employee was or should have been aware of it. (**See:- John Grogan: Workplace Law, 8th edition page 158**). In casu, even if one were to assume for one moment in favour of the Applicant that she was not aware of the checklist for invigilators, the Applicant as the Chief Invigilator, ought to have known that the conduct was prohibited.
20. The evidence before the Court revealed that when Ms. Phumlile Dlamini got into the examination room to assist the pupils, the Applicant was sitting next to the entrance door. The evidence also revealed that it was the Applicant who warned the Ms Phumlile Dlamini that a motor vehicle from the Examinations Council of Swaziland was approaching the school. That evidence showed that Ms. Phumlile Dlamini was assisting the pupils with the full knowledge and approval of the Applicant.
21. The Court will therefore come to the conclusion that the Applicant did commit the malpractice and misconduct with which she was charged

of allowing Ms. Phumlile Dlamini to get into the examination room to assist the pupils in answering an examination question. The dismissal of the Applicant was therefore substantively fair.

22. The Applicant denied that she was served with the charge. She told the Court that she got to know about the disciplinary hearing through the Regional Educational officer (REO). The Applicant said when she appeared before the 1st Respondent's Commissioners, the matter was postponed on two occasions and the hearing eventually commenced on 24th July 2007.
23. The Applicant having denied that she was served with the charges prior to her appearance before the 1st Respondent's tribunal on 24th July 2007, the evidentiary burden shifted to the 1st Respondent to prove on a balance of probabilities that the Applicant was served with the charge before the hearing commenced on 24th July 2007. The Executive Secretary of the 1st Respondent Mr. V. Zungu was not called to testify before the Court to dispute the Applicant's evidence.
24. RW1 told the Court during cross examination that the charge was made known to the Applicant through the invitation letters. When asked as to how did the Applicant get the invitation letters, RW1 told the Court that these were posted to the school. There was no evidence that the Applicant did actually receive the invitation letters. There was also no evidence that the letters were posted at all as there was no posting certificate produced in Court.

25. There was no evidence from the record of the disciplinary hearing that the Applicant was asked if she had a legal representative or that she was going to conduct her own defence before the commencement of the disciplinary hearing.
26. RW1 told the Court that the 1st Respondent relied on documentary evidence, being the report by the inspectors from the Examinations Council of Swaziland. (**Annexure TSC 4 pages 29 – 35, of the Book of Pleadings Volume 2**). There was however no evidence that the Applicant was served with the copy of the report that was used against her during the disciplinary hearing. This was clearly unfair on the part of the Applicant.
27. There was also no evidence that the Applicant was furnished with the reasons for the decision to dismiss her from service. This was unfair and contrary to the provisions of **Section 33 (2) of the Constitution of the Kingdom of Eswatini** which provides that;
- “(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.”*
28. There was also no evidence that the Applicant was advised that she had the right to appeal. The right to appeal is a fundamental requirement of a fair hearing. It cannot be said that the requirements of justice and fairness were met if the accused employee was not afforded the opportunity to appeal the decision of the disciplinary

hearing tribunal. Again, for this reason, the dismissal of the Applicant was procedurally unfair.

29. The Court will therefore come to the conclusion that the dismissal of the Applicant was procedurally unfair.

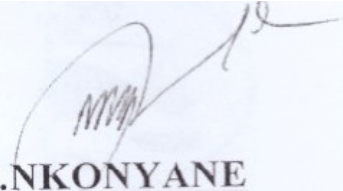
30. RELIEF:

The Applicant is fifty-three years old. She has five children and two grandchildren. At the time of her dismissal she was earning E10,482.50 per month. The Applicant committed a very serious misconduct which affected the future of the pupils who sat for the November 2005 Standard Five external examination. The evidence showed that the Examinations Council of Swaziland did not release the results of that school. One of the affected pupils was RW2. She told the Court that she is currently staying at home as she was unable to sit for the external examination again.

31. The right to a fair disciplinary hearing is a fundamental right. However guilty an accused employee may appear, he is still entitled to a fair disciplinary hearing. A fair disciplinary hearing is an end in its own right. **(See:- Alpheous Thobela Dlamini V Dalcrue Agricultural Holdings (PTY) LTD case number 123/2005 (IC).** The Court will award compensation to emphasize to all employers the need to afford an accused employee a fair disciplinary hearing however guilty that employee may appear. The Court taking into account the personal interests of the Applicant, the interests of justice

and fairness, will award the Applicant an amount equivalent to two months' salary as compensation for the procedurally unfair dismissal, being the sum of E20,965.00 There will be no order as to costs.

32. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant : *Ms. S. Dlamini*
(Attorney from Howe Masuku Nsibande Attorneys)

For Respondents: *Mr. V. Manana*
(Attorney from the Attorney – General’s Chambers)