



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 150/2012

In the matter between:

NTOMBIFUTHI NKAMBULE

Applicant

and

SEFIKA INSURANCE BROKERS

Respondent

Neutral citation: *Ntombifuthi Nkambule v Sefika Insurance Brokers (150/2012) [2016] SZIC 59 (December 02, 2016)*

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

Heard submissions 22/11/16

Delivered judgement: 02/12/16

Labour Law---Applicant employed by the Respondent in the insurance industry---Employer coming across certain information concerning her departure from the previous employment---Employer requesting the employee to make a statement and the employee refusing to make the statement on the basis that the matter was under police investigation.

Held---There was no legal basis for the employee to refuse to make the statement to the employer---The employer/employee relationship between the parties created a duty on the Applicant to comply with the employer's instruction as long as it was lawful.

JUDGEMENT

1. This is an application for determination of an unresolved brought by the Applicant against the Respondent in terms of the Industrial Relations Act No.1 of 2000 as amended.
2. The Applicant is a former employee of the Respondent. She was employed by the Respondent on 01st April 2010 and was in continuous employment until she was dismissed on 22nd February 2011 after she was found guilty of gross dishonesty and/or fraudulent non-disclosure.
3. The Applicant reported the matter of her dismissal to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute. The

dispute could not be resolved by Conciliation and the Commission duly issued a certificate of unresolved dispute.

4. The evidence before the Court revealed that the Applicant was an employee of Alexander Forbes before she joined the Respondent on 01st April 2010. The Applicant is in possession of a STANLIB accreditation. This gave her the competitive edge and was the preferred candidates for the Respondent. She was also in possession of an IFA Code.

5. During October 2010 the Director of the Respondent, RW1, Zintombi Ntiwane received a phone call from an employee of Alexander Forbes by the name of Lucky Mahlalela. The subject of the discussion was a letter which appears on **page 4 of Exhibit A**. This letter was written to STANLIB advising that the Applicant was going to retain her IFA Code even though she was leaving Alexander Forbes. This letter was written on 24th March 2010. It transpired that the signature in that letter was forged. The matter was reported to the police. The Applicant was arrested. She was later charged with forgery and uttering. She appeared before the Magistrate's Court in Mbabane. She was however acquitted and discharged. The Respondent also instituted disciplinary hearing against the Applicant. She was charged with gross dishonesty and/or fraudulent non-disclosure of information required by the Company. She was found guilty as charged by the chairman of the disciplinary hearing who recommended a dismissal.

The recommendation was adopted by the Respondent and she was accordingly dismissed by letter dated 22nd February 2011.

6. The Applicant claimed that her dismissal by the Respondent was both substantively and procedurally unfair. The Respondent disputed the Applicant's claim. The Respondent's case was that the dismissal of the Applicant was fair because:

6.1 She was found guilty of gross dishonesty as she used her former employer's Independent Financial Advisor (IFA) Code to unfairly attract clients to the Respondent's business.

6.2 Her conduct exposed the Respondent to legal suits and deregistration by the Registrar of Insurance and Retirement Funds.

6.3 The Applicant's conduct brought the name of the Respondent into disrepute.

6.4 She was subjected to a fair disciplinary hearing.

7. **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-**

The evidence revealed that as the result of the fraudulent letter, **page 4 of Exhibit A**, the Applicant was suspended from writing STANLIB

business as a Broker by letter dated 20th October 2010 (**Exhibit A of R1**). The letter also advised the Applicant that she was going to be informed of the findings of the investigations by close of business on Thursday 21st October 2010. At this point the matter of the Applicant of using the IFA Code that she was using whilst she was employed by Alexander Forbes had been reported to the police. The police were also doing their own investigation and they were frequenting the Respondent's premises. The Respondent's Management did not like that as they said it was putting a dent to the image of the Respondent.

8. On 06th December 2010 the Respondent's Director, Rw1 wrote a letter to the Applicant asking her to provide an explanation about the alleged fraudulent activities involving her and Alexander Forbes. The Applicant responded by letter dated 07th December 2010. The Applicant stated in her response that she received the Respondent's letter after hours. She also stated that on the same day on 06th December 2010 she received a call from the police asking her to come to the police station on 07th December 2010 at 08:00 A.M. She said she would therefore postpone submitting her response pending her appearance before the police. It seems that the Applicant wrote two letters on that day on 07th December 2010. The other letter appears on page 7 of Exhibit A where the Applicant stated that "*...Thus I would not be able to give a statement to Sefika Insurance Brokers with pending Court case. My reasons are very clear, anything I say or write from this day can be used against me in Court. I am sorry but I have to exercise my right to remain silent till matter is finalized.*" The

Respondent interpreted this as a refusal by the Applicant to supply the information requested by the employer. The Applicant was thereafter charged by the employer.

9. The issues for determination by the Court therefore are whether the Applicant committed an act of gross dishonesty and/or fraudulent non-disclosure when she failed to respond to the letter of 06th December 2010; secondly; whether the Applicant's disciplinary hearing was fairly conducted by the Respondent.

10. **FAILURE TO SUPPLY INFORMATION REQUESTED BY THE EMPLOYER:-**

The Applicant's attorney argued before the Court that the Applicant did not refuse or fail to respond to the request to make a statement by the employer. The Applicant's attorney argued that the Applicant simply asked to postpone the writing of the statement. The fact of the matter is that the Applicant did not write the statement. She had her reasons for not writing the statement as requested by the employer. The question that arises is whether the Applicant's conduct of not complying with the employer's instruction to provide an explanation valid and justifiable. Applicant was not being asked to make a statement to the Police. She was not a witness in a criminal case such

that it could be argued that she was invoking the privilege against self-incrimination as provided for by the Criminal Law and Procedure Act No.67 of 1938 as amended. She was simply being asked by her employer to give an explanation about issues relevant to the employment relationship that she had with the Respondent. The evidence revealed that when the Applicant was being asked by the employer to write the statement;

- a) There was a letter that was written on the letterheads of the Applicant's former employer, Alexander Forbes, stating that the Applicant was going to retain her IFA Code. The authenticity of this document was being questioned.
 - b) The Respondent was not aware of this letter or arrangement. When the employer (RW1) asked the Applicant about this document, the Applicant refused to comment.
 - c) The Respondent also discovered that on 20th October 2010 the Applicant was suspended from writing STANLIB business as a broker.
11. RW1, Zintombi Ntiwane told the Court that when the employer wrote the letter to the Applicant on 06th December 2010, it was not the first time that the employer was asking the Applicant to explain what was going on. She said the Applicant refused to comment. That the Applicant was not being asked for the first time also appears from the letter that was written to her by the employer. Paragraph two of the letter (**page 6 of Exhibit A**) states that “ *As a company we are entitled to know the circumstances around these allegations hence the reason*

why we have requested (on several occasions) that you furnish us with a statement detailing the events.”

12. The Respondent’s evidence that the Applicant was not being asked for the first time to provide an explanation about the events that were unfolding at that time was not disputed. Assuming for one moment that the Applicant had an excuse not to furnish the statement since the matter had been reported to the Police, the Applicant failed to explain to the Court why she did not supply the information on the previous occasions when the matter had not yet been reported to the Police. The Applicant therefore had no justifiable excuse not to heed the employer’s instruction.

13. The next issue to be decided is whether the Applicant was properly charged with gross dishonesty and /or fraudulent non-disclosure of information. The charges were based on the conduct of the Applicant of failing to supply the information required by the employer. It was argued on behalf of the Applicant should have been charged with gross insubordination. We agree that that was also an alternative that was available to the Respondent. We do not however agree that the charge in its present form was so badly drafted such that the Applicant should have been acquitted. From the evidence before the Court, there was an element of fraud on the part of the Applicant. One of the elements of fraud is misrepresentation. Misrepresentation can be by words or conduct. It can also be by silence, that is, non-disclosure or concealment when there is a duty to disclose. In the context of this case, and taking into account the nature of the sensitive nature of the

business that the Respondent was involved in, there was a duty to disclose even before the Applicant was requested to explain the circumstances surrounding her departure from Alexander Forbes and the use of the IFA Code that she used when she was still employed by Alexander Forbes. Taking into account all the evidence before the Court, the Court will come to the conclusion that the dismissal of the Applicant was for a fair reason.

14. **PROCEDURAL FAIRNESS:**

The evidence revealed that the chairman of the disciplinary hearing was a lawyer who was also involved in the drafting of the charges. The evidence also revealed that the initiator was also a lawyer. The Applicant applied to be also given the opportunity to be represented by a lawyer. Her application was dismissed by the chairman. During cross examination, the initiator, RW2, admitted that the parties were not equally matched in terms of expertise.

15. The evidence also revealed that during the hearing, the Applicant was asked to mitigate before the verdict was pronounced. RW2 told the Court that the chairman said he was doing that in the interest of time. This conduct by the chairman was clearly irregular and prejudicial to the Applicant's right to a fair hearing. In the circumstances it cannot be said that the Applicant's disciplinary hearing was fairly conducted. The dismissal of the Applicant was therefore procedurally unfair.

16. **CONCLUSION:-**

The evidence before the Court revealed that the Applicant failed to supply information required by the employer. She failed to provide any legal justification for her conduct. The evidence however revealed that disciplinary hearing was not fairly conducted by the Chairman who failed to grant the Applicant the opportunity to be legally represented taking into account that the Chairman and the initiator were lawyers. There was therefore no equality of arms. The chairman also committed a gross irregularity by asking the Applicant to mitigate before the pronouncement of the verdict. The dismissal of the Applicant was therefore procedurally unfair.

17. **RELIEF:-**

The Applicant was in the employment of the Respondent for about eleven months. She was employed in a highly specialized and sensitive industry. It will therefore be very difficult for her to get employment in this industry in future. She told the Court that her life changed drastically as a result of the dismissal. She said she lost her furniture and two motor vehicles and that she was unable to pay schools fees for her child who was chased away from school. The Applicant having succeeded only on one aspect of the dismissal, that is, procedural unfairness, the Court will make an order that the Respondent pays half the costs of suit of the Applicant. Taking all these factors into account, the Court is of the view that compensation equal to six months' salary would be fair in the circumstances.

16. The Court will therefore make an order that the Respondent is to pay to the Applicant the following amounts:-

a) Compensation (E14,992.00 x6)

E89, 952.00

b) The Respondent is to pay half the costs of suit.

The members agree.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant:

Mr. N.D. Jele
(Robinson Bertrams)

For Respondent:

Mr. .Z. Hlophe

(Magagula & Hlophe Attorneys)