



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 508/08

In the matter between:

SIBONGILE MAGAGULA

Applicant

And

B.D.G. AGENCIES (PTY) LTD

Respondent

Neutral citation: *Sibongile Magagula v B.D.G. Agencies (Pty) Ltd*
(508/08 [2012] SZIC 31 **NOVEMBER 27 2012**)

Coram: NKONYANE J,
(*Sitting with G. Ndzinisa & S. Mvubu*
Nominated Members of the Court)

Heard: **02 NOVEMBER 2012**

Delivered: **27 NOVEMBER 2012**

Summary:

Applicant insulting and threatening to assault a fellow employee at work following an argument between the two of them. Threat or ill treatment of towards another employee is a fair ground for dismissal. Dismissal however

found to be procedurally unfair and Court ordered compensation to be paid to the Applicant.

Violence or threats of violence have no place at the workplace and will not be countenanced by the Courts.

JUDGMENT 27.11.12

[1] This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of the provisions of the Industrial Relations Act No.1 of 2000 as amended.

[2] The Applicant is an adult married female Swazi of Pigg's Peak in the Hhohho District.

[3] The Respondent is BDG Agencies (Pty) Ltd, a company duly incorporated in terms of the Company Laws of Swaziland.

BACKGROUND:

[4] The Respondent is a small family business dealing with photocopying of documents and other related activities. The Applicant was employed by the Respondent in 1998 as a cleaner, and she was later promoted to the position

of Sales Assistant. Prior to this, the Applicant was once employed as a maid by one of the Directors of the Respondent in 1994. The Applicant worked continuously for the Respondent until 15th December 2006 when she was summarily dismissed after a disciplinary hearing.

[5] The Applicant claims that her dismissal by the Respondent was substantively and procedurally unfair and unjust because:

5.1 The charges against her were falsified and trumped up specifically to justify her termination.

5.2 At the hearing, she was not allowed representation.

5.3 She was not allowed to bring witnesses to testify on her behalf.

5.4 She was not given an opportunity to cross examine the witness.

[6] The Applicant duly reported a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute was not resolved at CMAC

and a certificate of unresolved dispute was issued and is attached to the Applicant's application and is marked Annexure "B".

[7] The Applicant in the present application is claiming the following from the Respondent;

7.1 Re-instatement, alternatively;

7.2 24 months compensation for unlawful dismissal.

7.3 1 month's notice pay

7.4 Leave pay.

7.5 Additional notice

[8] The Applicant's application is opposed by the Respondent. The Respondent averred in its Reply that the Applicant's service was terminated because she insulted and threatened a fellow employee and further made disrespectful comments to a member of management. The Respondent further averred that the Applicant was properly charged and her rights were fully explained and she opted to conduct her own defence.

[9] THE EVIDENCE:

The Applicant was the only witness for her case. The Respondent led four witnesses. The Applicant told court that she was first employed as a

domestic worker in 1994 by one of the Directors of the Respondent. In 1998 she was employed by the Respondent first as a Cleaner, but she later became a Sales Assistant and Cashier. She said the employer was happy with her performance hence she was promoted to the position of Assistant Supervisor. She said there were three employees in the shop including herself. She was not in good terms with one of the employees by the name of Phindile Khumalo.

[10] The Applicant said one day she was operating the till and Phindile Khumalo was serving a customer who had come for colour copies and laminating. Phindile then gave the Applicant the money paid by the customer in order for the Applicant to put it in the till and produce a receipt. There was however an extra amount of E20.00 and the Applicant asked Phindile what that amount was for. Phindile responded by asking the Applicant why did she not recognize what was written on the paper that she gave to her and that the Applicant's little education was a problem.

[11] An altercation between the two ensued. There was a heated exchange of strong words and insults. Both Directors, Benita Paiva and Leonarda Roberts were present. They tried to calm down the two employees. The Applicant said she asked Phindile to respect her, but Phindile told the

Applicant that she (the Applicant) was not going to do anything because the shop was a family business.

[12] The Applicant told the court that one of the Respondent's Directors telephoned Phindile's boy friend to come over. Phindile's boyfriend Sabelo Dlamini came and had a word with the Applicant and also slapped the Applicant. The Applicant then went away to report the assault to the police station. The Applicant was thus later charged with going away without permission.

[13] The Applicant also told the court that one day Phindile called her a prostitute. The Applicant said she told Phindile to stop doing that but she did not. The Applicant said Benita Paiva joined Phindile and they talked in English and laughed at her.

[14] The skirmish happened in full view of customers who had come to the shop on that morning.

[15] The Applicant was charged and brought to a disciplinary hearing. She was facing six charges. One of the charges was that of threatening to assault Phindile Khumalo, a fellow employee on company premises while on duty

on 24th November 2006. The disciplinary hearing was held on Thursday 7th December 2006 at Bhunu Mall Board Room and was chaired by RW1, Sibusiso Nhleko, an independent candidate.

[16] In his evidence RW1 told the court that he explained the purpose of the meeting to the Applicant. RW1 also said he did inform the Applicant of her rights and that the Applicant told him that she did not want to be represented by a fellow employee because they would tell lies against her. RW1 said at some point the Applicant stormed out of the hearing and came back after five minutes. RW1 also told the court that the Applicant chose to remain silent during the hearing. RW1 admitted that prior to the disciplinary hearing of 7th December 2006, he chaired a disciplinary hearing involving the Applicant in November 2006.

[17] RW2, Leonarda Roberts told the court that she is the Co-Director of the Respondent. The other Director is her sister RW4, Benita Paiva. RW2 confirmed the Applicant's evidence relating to the skirmish that took place at the shop. RW2 said the Applicant called Phindile a prostitute and also made a lot of other unsavoury comments. RW2 said the Applicant told her to leave her (the Applicant) alone as she had failed to discipline Phindile. RW2 said the Applicant failed to heed her instruction to stop shouting in

front of customers. RW2 said she tried to hold mediation between the Applicant and Phindile at the shop, but the Applicant was not interested.

[18] During cross examination, RW2 admitted that Phindile was raised up by her family but she was not formally adopted.

[19] RW3, Phindile Khumalo told the court that she was the one who was operating the till on the day in question. She said the Applicant was attending to a customer and after the customer had paid, she asked the Applicant what she was going to write on the pay slip. RW3 said the Applicant responded by saying that it was still early in the morning why was she (RW3) absent minded and that she (Applicant) was going to kick her and pay a fine of E80.00. RW3 said Mrs Roberts, (RW2), intervened but the Applicant continued to insult RW3.

[20] During cross examination RW3 admitted that she was raised by RW2 and RW4's family and that she considered them as her family.

[21] RW4, Benita Paiva gave evidence that was similar to that of RW2 and RW3. She told the court that the Applicant failed to heed reasonable instructions from management to stop threatening to assault a fellow employee. She said the police did come to the shop to ask for the Applicant

as she had reported a case of assault to the police. She also said that the relationship between the Applicant and the Respondent has irretrievably broken down.

[22] ANALYSIS OF EVIDENCE:-

From the evidence before the court we found that the following facts were proved:-

22.1 There was a bad blood between the Applicant and Phindile Khumalo. The Applicant regarded Phindile as a favourite of the Respondent's Directors, RW2 and RW3.

22.2 There was a skirmish that ensued between the Applicant and Phindile at the shop in full view of the customers.

22.3 The Applicant did utter unsavoury words and insults against Phindile, and also threatened to assault her.

[23] It is not hard to understand why the Applicant behaved as she did on that day. The evidence revealed that the Applicant and Phindile quarreled from time to time and when the Respondent's Directors intervened, the Applicant felt that they were always on Phindile's side. That however did not entitle

the Applicant to ignore warnings from her employers to stop threatening and insulting Phindile within the business premises. When the incidence took place, the Applicant had a final written warning against her issued on 03rd November 2006 for a similar offence against Phindile.

[24] Violence, threats of violence and ill-treatment towards a fellow employee is prohibited under the **Employment Act No.5 of 1980 as amended. Section 36 (b) of the Employment Act** provides that it shall be fair for an employer to terminate the service of an employee if the employee is guilty of violence, threats or ill-treatment towards the employer or other employee of the undertaking.

[25] The evidence as to who started the quarrel was contradictory. The Applicant said it was Phindile and Phindile said it was the Applicant. From the evidence before court however, even if the court were to find that it was Phindile who was the source of the misunderstanding, it does not assist the Applicant because the evidence revealed that the Directors tried to intervene, but the Applicant was unco-operative, and continued to hurl insults against Phindile. The evidence clearly revealed that the Applicant had a deep seated resentment against Phindile because she felt that the Respondent's Directors always took Phindile's side whenever the two of

them quarreled. Even if this was true, violence or threats of violence and unruly behaviour at the workplace will not be countenanced by the Court.

[26] Furthermore, even if it was shown that the Applicant was provoked by Phindile, from the evidence before the court it cannot be said that the provocation was so intense such that the Applicant failed to control herself. In any event that was not the Applicant's defence in Court. The Applicant failed to heed the employer's order to stop threatening Phindile. The instruction from the employer was reasonable.

See:- **CCAWUSA V. WOOLTRU LTD t/a
WOOLWORTHS (RANDBURG)
(1989) 10 ILJ 311 (IC)**

[27] The court will therefore come to the conclusion that the dismissal of the Applicant was for valid reasons in terms of **Section 36(b) and (j) of the Employment Act.**

[28] **PROCEDURAL FAIRNESS**

The record of the disciplinary hearing held on 07th December 2006 was produced in court. Although the Chairman said he told the Applicant the nature of the proceedings, the record shows that Mr. Sibusiso Nhleko

(RW1) was a mediator. The record also shows that the Applicant informed the Chairman that she wanted to be represented by a lawyer. There was no further enquiry on that issue. It was clearly wrong for the Chairman to treat lightly the request of the Applicant.

[29] During cross examination RW1 was asked why he did not probe further the reason why the Applicant wanted outside representation, RW1 said he did and found that the request was frivolous. RW1 further said there were no compelling reasons to treat the Applicant's case as exceptional. The court does not agree with RW1. If RW1 had given sufficient attention to the Applicant's request, he would have found that the Respondent was a small family business and that there was likelihood that the Applicant would not get proper representation by the two other employees of the Respondent. The Chairman also did not invite submissions from the Respondent's representative to find out if they were opposed to the Applicant's request.

[30] From the evidence before the court, it cannot be said that the Chairman judiciously exercised his discretion when he refused outside representation as requested by the Applicant.

See: **Ndoda Simelane v. National Maize Corporation
(Pty) Ltd case No. 456/06 (IC).**

[31] The court will therefore come to the conclusion that the dismissal of the Applicant was not procedurally fair.

REMEDY:

[32] The Applicant told the court that she was presently unemployed. She told the court that she never went on leave. She has four children, three of which are attending school. The evidence clearly showed that the relationship between the Applicant and the Respondent's Director is strained. It will therefore not be recommended that she be re-instated. In any event, the court has found that substantively her dismissal was fair, it was only procedurally unfair. In such circumstances, and in view of the provisions of **Section 16 (4) of the Industrial Relations Act, 2000, as amended**, the court will order that compensation be paid to the Applicant.

[33] Taking into account all the evidence before the court and also all the personal circumstances of the Applicant, the court will make an order that the Respondent pays the leave pay due and compensation based on three months' salary of the Applicant.

[34] The court will accordingly make an order that the Respondent pays to the Applicant the following:-

a)	Leave pay	E1,022.58
b)	Compensation (E1,250.00 x 3 months)	<u>E3,750.00</u>
	TOTAL	<u>E4,772.58</u>

[35] There is no order as to costs.

[36] The members agree.

N. NKONYANE J
JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. S. Mavimbela
(Zonke Magagula & Co.)

For Respondent : (Mr. L. Manyatsi)
Rodrigues & Associates)