

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 324/2020

In the matter between:

SINDISIWE MAGAGULA

Applicant

And

MATATA GROUP (PTY) LTD

Respondent

Neutral Citation: Sindisiwe Magagula vs. Matata Group (Pty) Ltd (324/2020)
[2021] SZIC 93 (01 December 2021)

Coram: **V.Z. Dlamini - Acting Judge**
(Sitting with A. Nkambule and MT E Mtet.va - Nominated
Members of the Court)

SUBMISSIONS FILED : 25 November 2021

JUDGMENT DELIVERED : 01 December 2021

SUMMARY: Applicant instituted an application for determination of an unresolved dispute challenging her dismissal. Respondent fails to file Notice of Intention to Oppose or Replies; Service of the application supported by a deputy sheriff's return of service, on perusal Court satisfied that there was proper service and refers matter to ex parte trial.

HELD: The onus of proving a fair dismissal lies with the Respondent, but having failed to oppose the application and the Court having considered the unchallenged evidence of the Applicant is satisfied that dismissal was unfair.

JUDGMENT

INTRODUCTION

[1] The Applicant is an adult liSwati female of Ndunayithini area in the Shiselweni. The Respondent is a company duly registered and incorporated in terms of the Company laws of Eswatini having its principal place of business at Matata area in the Lubombo region.

[2] The Applicant instituted on an application for the determination of an unresolved dispute on the 16th November 2020, alleging that she was unfairly dismissed by the Respondent on the 20th February 2020. Her application was supported by a certificate of unresolved dispute and she claims the following relief:

(a)	Notice pay	E2862.25
(b)	Additional notice pay	E880.69
(c)	Severance allowance	E2201.60
(d)	Maximum compensation for unfair dismissal	E34 344.96
(e)	Costs of suit	

(g) Further and/or alternative relief

- [3] In terms of returns of service issued by a deputy sheriff, the Respondent was served with the application and a notice of reinstatement of the matter on the 22nd January 2021 at 1005hrs upon one Mavis Nxumalo, an Admin Manager.
- [4] The Court was satisfied that proper service of the application was effected and that since the 22nd January 2021, the Respondent has never filed either a Notice of Intention to Oppose or Replies. The matter was then referred to *ex parte* trial.

APPLICANT'S EVIDENCE

- [5] The Applicant testified that she was employed in March 2017 as a Domestic Worker (Maid) stationed at the director's residence. In 2019, she was promoted to the position of Cashier based at Matata Engen Filling Station, but she also doubled as a Petrol Attendant. She was on night-shift duty as Cashier on or about the 5th February 2019 when she fell sick. She approached the Manager one Siphiwe Malinga to notify her and asked to be released, but the latter ignored her.
- [6] The Applicant told the Court that the Manager knocked off at 5.30pm and left the Supervisor one Bongani Mnisi in charge. She reported to the Supervisor that she was not feeling well, but he too disregarded her

condition until she asked a colleague one Njabulo Vilakati to plead on her behalf; it was only then that the supervisor granted her permission to leave. However due to her poor state of health, the Applicant left without handing over the till cash to a colleague, nevertheless no one reported a cash shortage as a result of that incident.

[7] According to the Applicant, she went to Bholi Clinic on the 6th February 2020 and was certified unfit for work on that day. She only returned to work on the 8th February 2020. When she returned the Applicant gave a sick sheet to the Human Resources Manager one Noncedo Mazibuko who took it but commented that it was not authentic. She was not assigned to work as Cashier despite that it was her tum. On the 11th February 2020, the Applicant was served with a notification to attend a disciplinary hearing on the 14th February 2020.

[8] The Applicant was charged for leaving her duty station on the 5th February 2020 without the permission of her supervisor or obtaining a sick sheet and without conducting cash up of her daily takings. The second count was absconding work on the 6th and 7th February 2020 without permission of her supervisor or obtaining a sick sheet.

[9] The disciplinary hearing was chaired by one Fana Tsabedze who was the Manager at Nsoko Savemore Supermarket, a subsidiary of the Respondent. Her Manager Siphiwe Malinga was the company

representative and one

Sifiso Mahlalela was the scribe. The Applicant was not represented by a co-worker because she never requested anyone to represent her. She told the Court that neither the company nor she paraded any witnesses.

[10] The Applicant was found guilty as charged and dismissed; however, the letter of termination advised her of the right to appeal against the dismissal. She submitted a letter of appeal to one Mavis and made a follow up with one Sifiso Mahlalela, the Assistant Human Resources Manager who confirmed that the letter of appeal was duly received; nevertheless, no appeal was convened.

[11] The Applicant exhibited a letter from Bholi Clinic confirming that she was booked off sick on the 6th February 2020; she said the Clinic was could not issue to her a duplicate sick sheet. She also produced copies of the charge sheet, disciplinary hearing findings and verdict, letters of dismissal and appeal. She testified that currently she was unemployed and not married, but has several dependants including her 83 year old mother, two biological children and her brother's children whose parents were deceased.

CLOSING SUBMISSIONS

[12] The Applicant's representative Mr. Magagula submitted that the Court was called upon to determine whether the Applicant's dismissal was substantively and procedurally fair.

- [13] Mr. Magagula argued that the Applicant's dismissal was substantively unfair because her absence from work was justified by a sick note as required by **Section 36 (a)** of the **Employment Act, 1980** and in any event she was absent for only one day as such she did not fall foul of the provisions of the Act. Moreover, the representative contended that the Applicant had a clean record which was never taken into account when her sanction was considered. He added that the Respondent never suffered any prejudice from the alleged misconduct.
- (14) Mr. Magagula relied on the following cases on the substantive aspects of the Applicant's case: **Mhlume Sugar Company v Jabhane James Mbuli (ICA Case No. 1/1991)** and **Brian Ngwenya v Swaziland Development and Savings Bank (1/2013) [2013] SZICA**.
- (15) On the procedural aspect of the case, Mr. Magagula submitted that the Applicant's dismissal was unfair because she was not afforded the right of appeal. He relied on the following authorities: **Nkosinathi Ndzimandze and Another v Ubombo Sugar Limited (IC Case No 476/2005); JOHN GROGAN: WORKPLACE LAW 9t1, EDITION (2007)**.

ANALYSIS

- [16] The Respondent bears the onus of proving that the termination of the Applicant's services was fair. The principle finds support in **Section 42** of the **Employment Act, 1980**. Inevitably, the onus has not been discharged

in the absence of any appearance by the Respondent. Nevertheless, the Court is satisfied that the dismissal of the Applicant was substantively and procedurally unfair for the reasons set out below.

[17] **Section 36 (a)** of the **Employment Act** provides that it shall be fair for an employer to dismiss an employee for being absent from work for more than three (3) working days in a total of thirty (30) days without the permission of the employer or a medical certificate that the employee was unfit for duty on those occasions.

[18] The Applicant's evidence that on the 6th February 2019, she was granted permission by her supervisor remains unchallenged. Even if she did not have that permission, her testimony that she was sick that day was also not refuted. It would be unreasonable and insensitive of an employer to deny an employee permission to seek medical attention. It is for that reason that we find that the Applicant's condition at the time is a mitigating factor in count one (leaving before the handover of till cash).

[19] The Applicant stated that she asked several times to be released, but her superiors ignored her until a colleague pleaded on her behalf. The Respondent must also shoulder responsibility for putting the Applicant under physiological and psychological pressure resulting in her leaving without conducting the handover. In any event, the Applicant stated that no cash shortages were reported.

(20] As for the 7th February 2019, the Applicant had a sick sheet, which she submitted to the Human Resources Manager. The onus of proving that the sick sheet was fraudulent lies with the Respondent. This principle was pronounced in the case of **Jabulane Simelane v Cadbury Swaziland (IC Case No. 261/1999)**.

(21] Even if we were to find that the Applicant was absent for two days that would not warrant a fair dismissal in terms of the **Employment Act**. In the case **The University of Swaziland v The President of the Industrial Court and another (ICA Case No.16/2002)**, the Industrial Court of Appeal confirmed the decision of the President who held that it was not fair for the employer to dismiss an employee for absenteeism of just three days.

[22] On the procedure, the Applicant's version that having been advised to appeal, she did but was never called for an appeal hearing also remained unchallenged. The importance of an appeal hearing as a component of a fair procedure before dismissal was emphasized in the case **of Nkosinathi Ndzimandze and Another v Ubombo Sugar Limited (supra)**.

RELIEF

(23] Having held that the Respondent failed to discharge its onus of proving that the Applicant's dismissal was substantively and procedurally fair due to non-appearance, and having been satisfied with the evidence led by the

Applicant to establish dismissal, the Court therefore holds that she is entitled to her terminal benefits.

[24] **In** awarding compensation to the Applicant, we have considered her personal circumstances and hold that an award of seven (7) months' wages is just and equitable **in** all the circumstances.

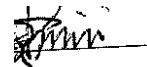
[25] In the result, the Court orders as follows:

[a] The Respondent is directed to pay the Applicant the following terminal benefits and compensation:

Notice pay	E2 862.25
Additional notice	E880.69
Severance allowance	E2 201.60
Seven. months compensation ,	E20 035.75

[b] There is no order as to costs.

The Members agree.



AMINI

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. V. Magagula

FOR RESPONDENT : No appearance