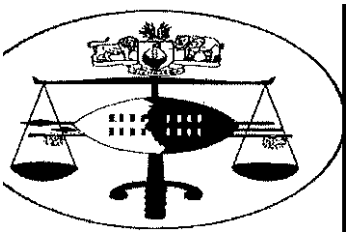

IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 195/2018

In the matter between:

SIBONGINKHOSI XABA	Applicant
And	
CIVIL SERVICE COMMISSION	1st Respondent
PRINCIPAL SECRETARY MINISTRY OF HEALTH	2nd Respondent
MINISTRY OF PUBLIC SERVICE	3rd Respondent
ATTORNEY GENERAL	4th Respondent

Neutral citation: Sibonginkhosi Xaba v Civil Service Board and 3 Others (195/2018) [2022] SZIC 26 (23 March 2022)

Coram: **S. NSIBANDE J.P.**

(Sitting with M.P. Dlamini and E.L.B. Dlamini Nominated Members of the Court)

Delivered: 23 March 2022

JUDGMENT

[1] The applicant brought to Court an application for the determination of the unresolved dispute he has with the respondents. In his pleadings he claimed that he had been unfairly dismissed and that his dismissal had been both substantively and procedurally unfair. He claimed his terminal benefits, leave pay, his July 2013 salary and twelve months' salary as compensation for unfair dismissal. His claim was for payment of the sum of E78 031.93 (Seventy Eight Thousand and Thirty-one Emalangeni ninety-two cents).

[2] His application was opposed by the respondents who denied that applicant's dismissal had been unfair either substantively or procedurally. It was the respondents' contention that the applicant had been dismissed for serious offences, which warranted his dismissal from employment under **Section 36** of the **Employment Act 1980.**

[3] The applicant has given evidence in proof of his claim and has closed his case. Instead starting on their defence the respondents chose to apply for absolution from the instance. It was the respondents'

contention that the applicant had failed to make a *prima* facie case considering the evidence delivered by the applicant at trial.

[4] At trial, the applicant testified that he had been accused of having stolen a fridge from his employer and which was found in his house. He had faced charges of theft of the fridge and for unauthorised borrowing of Hlathikhulu Hospital property and failure to act on lawful instructions/insubordination. The charge of theft was subsequently withdrawn at his disciplinary hearing and he was left with the two charges i.e. (i) insubordination; and (ii) unauthorised borrowing of hospital property.

[5] Respondents' stated that the applicant conceded to having taken the fridge for his personal use because he had a function and that he had kept it for over 3 months. They cited the case of **Bhekithemba Mamba v Max Enterprises (Pty) Ltd t/a Swaziland Security Academy IC Case No. 135/2010 [2018] SZ 137** for the proposition that there was no evidence (on the substantive nature of applicant's dismissal) required of them since applicant admitted under oath that he had taken the fridge.

[6] On the procedural aspect, the respondents alleged that applicant stated in his particulars that he was called to a disciplinary hearing and was found guilty by the disciplinary Chairman. Further that applicant stated that he was never afforded opportunity to call witness or cross examine those who were brought on behalf of the respondents. They submit that this constitutes an admission that the applicant was taken through a disciplinary hearing by the respondents.

They submitted further that in his evidence in chief he first gave the impression that he had not been given an opportunity to cross examine witnesses; that he had said, in answer to a question from his attorney, that he had been given a chance to put his side of the story and ask questions by the respondent. It was said that the he later denied having been given a chance to state his side of the story when he was being cross-examined.

They further submitted that his evidence was not corroborated by anyone; that he was not a credible witness since he contradicted himself on a number of issues in particular, that he gave different years for the number of years he had been employed.

It was the respondents' submission that the applicant had not made a *prima facie* case upon which a reasonable man in the position of the Court might find for the applicant. The Court was referred to **William**

Manana v Royal Swaziland Sugar Corporation (214/2007) SZIC 04; Nicholas Motsa v OK Bazaars (Pty) Ltd t/a Shoprite Industrial Court Case No.06/2015; and Hurtwitz Brney v Neofytou Darren Gauteng Division of the High of South Africa Case No. 235/2015.

[7] The applicant opposed the absolution from the instance application. He denied being untrustworthy and being of a demeanour suggesting his evidence was wanting; that the issue of the number of years he had been employed was a mere miscalculation and that the issue regarding disowning his pleadings had been as a result of failing to understand the cross-examiner's question - that none of these issues were designed to mislead the Court. . It was applicant's submission that he was a credible witness and that he had not lied about the lack of witnesses at his disciplinary hearing.

[8] The principle applicable to absolution applications was correctly stated by both counsel as follows

"At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a *reasonable man might find for the plaintiff ... in other words was there such evidence before the Court upon which* a *reasonable*

man might, not should give judgement against Hunter?" **(Gascoyne v Paul and Hunter 1917 TPD 170** *cited with approval in* **William Manana v Royal Swaziland Sugar Corporation (214/2007)[2007] SZIC 04).**

[9] *"The consideration of an absolution application is not done on the basis of simply accepting all the testimony presented by the applicant to be true. The evidence must still be evaluated and compared to all available evidence at that stage."* **(Justice Dlamini A. in William Manana supra).**

[10] This is the position that prevails in civil cases where the applicant is expected to place a *prima facie* case to be answered by a respondent. I dare say there is a slight but significant difference where absolution is sought in labour matters. This difference is, in our view, brought about by **section 35(2)** read with **section 42(2) of the Employment Act 1980.**

Section 35 (2) reads:

" *(2) No employer shall terminate the services of an employee unfairly."*

Section 42 reads:

(1) In the presentation of any complaint under this Part, the employee shall be required to prove that at the time his services were terminated that he was employee to whom Section 35

"(2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves:

(a) that the reason for the termination was one permitted by Section 36; and

(b) That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

[11] The import of these sections are that:

(i) An employee who seeks to claim unfair dismissal merely has to prove that he is an employee to whom **Section 35** of the **Employment Act 1980** applies and thus his services are not to be terminated unfairly;

(ii) That once he establishes that fact (or it is admitted), then the onus shifts to the employer to prove that the dismissal is one that is permitted by **Section 36** of the Act, and that in the circumstances of the case, it was reasonable to terminate his service.

[12] In the matter at hand, it is not disputed that the applicant was an employee to whom **Section 35** of the Act applies. The onus thus shifted to the respondents to show that the dismissal of the applicant was both substantively and procedurally fair. It is therefore not for the applicant to make a *prima facie* case, as the case may be.

[13] This is not to say that in a deserving case absolution can never be granted in a labour matter. Where an applicant before this court makes an admission· in his evidence in chief or under cross examination, of the commission of the offence for which he was dismissed, then the respondent would have discharged the burden of proof resting on it on terms of the law. **(Bhekithemba Mamba of Max Enterprises (Pty) Ltd (Supra) of Petros Da Silva, Plascon Paints Swaziland IC Case No. 102/02).**

[14] However, that would still not be the end of the matter where the applicant has claimed procedural unfairness in his dismissal, as is the case in this matter. The respondent would be expected to prove procedural fairness to the court. The respondent would still have to discharge the burden of proof resting on it in terms of **Section 42(2)** of our **Employment Act.** Again, if the respondent was able to illicit

through cross-examination and/or any other means, an admission that a disciplinary hearing was held fairly in terms of procedure then the respondent would be entitled to an absolution order provided the substantive fairness of the decision has been established as well.

[15] In the current matter, the respondent has not, in our view, made a case for absolution. The evidence before us on the substantive fairness of applicant's dismissal is that -

- applicant was called to a disciplinary hearing to face the three (3) charges - theft of a refrigerator; unauthorised borrowing of Hlathikhulu Government property; and, refusal to carry out a lawful instruction (insubordination).
- The charge of theft was withdrawn, leaving the applicant facing the unauthorised borrowing charge and the insubordination charge.
- He denied both charges and claimed to have been authorised by a nurse in charge of the refrigerator to take it.
- He also claimed that he had not been instructed to return the fridge and that the person who allegedly told him to do so was not his supervisor but his equal in terms of ranking within the hospital.

- On procedural fairness, he stated that he was invited to the hearing and was the only one who gave any evidence and that he was asked questions by the panel.
- He testified that the respondents never brought in any witnesses to the hearing, so he never got the opportunity to confront them.

[16] The issues raised by applicant in our view go to the substantive and procedural nature of his dismissal. If indeed he had been authorised to take the refrigerator by its custodian, can it be said that he had borrowed it without authority? Can it be said that he failed to follow instructions or that he was insubordinate if there was never an instruction given to bring back the refrigerator? The answer to these questions lie in the evidence to be brought by the respondents who have the burden to show the court, on a balance of probabilities, that there had indeed been an instruction to the applicant to bring back the fridge and that he had not been authorised to take it, in the first place.

[17] From the evidence before the court, the applicant has also raised issue with the procedure taken at his disciplinary hearing. The onus is on the respondents to show the court that this disciplinary hearing

was conducted in a fair manner. That the applicant was convicted of theft of the refrigerator does not mean the respondents are exonerated from having to establish the applicant's guilt in a disciplinary hearing. In the matter of **Mphikeleli Sifani Shongwe v Principal Secretary of the Ministry of Education and Three Others Industrial Court Case No. 207/2006** the Court stated that:

"It is a fundamental requirement of natural justice that a person must be given a fair hearing before a decision is taken which adversely affects his interest... the requirement of a fair disciplinary hearing is so fundamental, in labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable ... the position is the same where an employee has been convicted by a criminal court of a criminal offence which also gives rise to disciplinary charges. The employee is entitled to contest the correctness of the decision of the criminal court, and to try and persuade his employer that his defence was not properly presented at the criminal trial, or that there is other evidence which establishes his innocence, or that, for one reason or another the criminal verdict was mistaken or wrong."

[18] Quite clearly, from the above context the respondents remain with the onus of proving that the dismissal of the applicant was procedurally fair and that it was reasonable in all the circumstances of the case to dismiss the applicant, the applicant's conviction at the criminal court not withstanding.

[19] We have carefully evaluated the evidence before us at this stage and have considered the documentary evidence filed, together with the pleadings and have come to the conclusion that a case for absolution from the instance has not been made and that the application must fail.

[20] We have considered the issue of costs in respect of which we have discretion and have come to the conclusion that this is an appropriate case in which the costs should follow the course. We therefore make the following order:

20.1 The application for absolution from the instance is dismissed.

20.2 The respondents are to pay the costs of the application.

The Members Agree

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI

For the Applicant Mr. H. Magagula (Robinson Bertram Attorneys)

For the Respondents: Mr. B. Dlamini (Attorney General's Chambers)