



**IN THE INDUSTRIAL COURT OF ESWATINI**

HELD AT MBABANE

Case No: 05/22

In the matter between:-

**ZANELE THWALA**

APPLICANT

And

**THE PRINCIPAL SECRETARY,**

I<sup>st</sup> RESPONDENT

**MINISTRY OF AGRICULTURE**

**THE CHAIRMAN, CIVIL SERVICE**

2<sup>nd</sup> RESPONDENT

**COMMISSION**

**THE ATTORNEY GENERAL**

, 3<sup>d</sup> RESPONDENT

**Neutral citation:** Zanele Thwala v The Principal Secretary, Ministry of Agriculture  
and 2 others (05/22) [2022] SZIC33(01April2022)

**Coram:**

**MSIMANGO, ACTING JUDGE**

(Sitting with Mr S. Mvubu and Ms N. Dlarnini nominated  
Members of the Court).

**Date Heard:**

31<sup>st</sup>:JANUARY 2022

**Delivered:**

01<sup>st</sup> APRIL 2022

**Summary:** The Applicant is employed by the Respondent as a Nutrition Officer, she alleges that she received a letter from the 2<sup>nd</sup> Respondent advising that her monthly salary would be stopped immediately because she has been absent from work without official leave. The Applicant argues that she was not consulted about the issue of the freezing of her salary, hence the decision to freeze her salary was unlawful.

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## JUDGEMENT

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- [1] The Applicant is Zanele Thwala, a liswati major female resident of Malanti, in the District of Hhohho, employed by the 1<sup>st</sup> Respondent as a nutrition officer.
- [2] The Applicant alleges that she sustained an injury on duty on the 31<sup>st</sup> January 2014, whereby she fractured her right ankle while descending the steps at the entrance to her office.
- [3] A week later, after the injury an ankle implant was done, and same was removed in 2015. The Applicant submits that even after the surgery was performed, the pain persisted, and was compelled to stay at home for an extended period, a condition of which the Respondent in particular the 1<sup>st</sup> Respondent was aware of.
- [4] The Applicant submits that she was in constant communication with the 1<sup>st</sup> Respondent about her situation. The Applicant argues that the correspondences

and communication between her and the 1<sup>st</sup> Respondent adequately demonstrate that the Respondents were aware of her situation and that the reason she was not at work was because of the persistent pain that resulted from the injury on duty.

[5] The Applicant argued that the decision to stop the salary under the circumstances was irrational and unlawful in that it was not preceded by consultation nor a disciplinary hearing for the alleged absenteeism.

[6] The 1<sup>st</sup> Respondent argued that the Applicant has been unlawfully absent from work since 2014 and thereby committed a serious misconduct which amounts to a breach of the essential elements of the contract with the employer.

[7] The Respondent denies that the salary stoppage was irrational or unlawful, for the reason that the Applicant refused to repmi for duty after she was allocated light duties by her supervisor as per the recommendation of a medical doctor in 2015. Thus the employer has suffered harm as a result of payment of salary to an absent employee without any lawful justification.

[8] The very basis of the employment contract whether written or not, is that the employee has to come to work and be on time. The employer is paying the employee to come to work and perform his/her duties, if the employee does not do these things, this then amounts to breach of the conditions of employment. Furthermore, if the employee does not provide those services because of absenteeism, then it is unfair for the employer to have to pay for something that is a contractual right to receive. It is equally unfair for the employee to benefit by means of being paid for something he/she did not do in terms of the employment contract.

[9] GROGAN J, in the book WORKPLACE LAW TENTH EDITION at page 227, had this to say with regard to absenteeism:-

*" The employee's general duty is to render service, failure to discharge that duty is potentially a disciplinary offence. The onus rests on the employee to render a reasonable explanation for the absence. To justify dismissal, the courts require the absence to be of unreasonable duration, or frequent enough to disrupt work. Absenteeism is viewed in a more serious light (if the employee concerned was expressly instructed to report for duty at the time, and cannot offer an excuse such as illness to justify the failure to report for duty)".*

[10] The Applicant contends in her founding affidavit that she was forced to stay at home because of the persistent pain in her ankle, furthermore, that this was a state of affairs her employer was aware of and understood. She alleged that, there were correspondences to that effect between herself and the 1<sup>st</sup> Respondent and hospital documents to show that she was in constant communication with her employer about her condition.

[11] It must be mentioned that there is no such correspondence as alleged by the Applicant. There is neither medical records to prove that the Applicant was suffering from severe pain since 2015, nor the steps she took in alleviating the pain, for the past 8 years the Applicant has been receiving her monthly salary without providing service to her employer.

[12] **Section 130 of the Employment Act No.5/1980** provides that:-

*" (1) payment in respect of sick leave shall be subject to the employee producing a certificate of incapacity covering the period of sick*

*leave claimed signed by a medical practitioner and no employee shall be entitled to paid sick leave unless this section has been complied with.*

*(2)Nothing in subsection (1) shall be deemed to prevent an employer .....from granting paid sick leave unless this section has been complied with".*

[13] In the absence of such medical evidence and correspondences between the Applicant and her employer, the court is of the view that the Applicant was absent from work without authorisation. The court in the case of **WOOLWORTHS PTY LTD V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION & OTHERS (PA 12/2020) [2021] ZALAC 49**, held that:-

*" Unauthorised absence from work on the pretence of illness is dishonest conduct that negatively impacts upon the trust relationship and may justify dismissal".*

[14] In contending that her matter is urgent, the Applicant relies on the financial hardship she and her family are suffering or continue to suffer as a result of the stoppage of her salary. The court finds that financial hardship does not establish a basis for urgency, the Applicant has not been to work since 2014, in the circumstances she should have anticipated the consequences of her absenteeism without authorisation.

[15] Dealing with a similar matter, the court in the case of **MALATJI V UNIVERSITY OF THE NORTH (J 635/03) [2003] 32**, held that:-

***"financial hardship and loss of income are not considered to be grounds for urgent relief. Exceptional circumstances must exist before urgent interim relief can be granted".***

[ I 6] Having regard to all the circumstances of the matter, the court finds that the Applicant has failed to substantiate any of the allegations made in her papers. The attachments filed by the Applicant do not in any way assist the court in asce1iaining what was happening between the period 2014 and 202 I with regards to her injury. Fmihermore, the Applicant has failed to disclose that she received payment for her injury in terms of the **Workman's Compensation Act No. 7 of 1983**. Lastly, that she was offered to perform light duties by her employer, however, she refused.

[17] Consequently, the application is dismissed and there is no order as to costs.

The Members Agree.



**L. MSIMANGO**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant : Mr S.Chirwa. (Richstin Labour Law Consultancy).

For Respondent : Ms. Z. Nsimbini (Attorney General's Chambers)