



IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 172/2021

In the matter between:

SIPHO NKHAMBULE

Applicant

And

CHOICE CENTRE INVESTMENTS (PTY) LTD

Respondent

Neutral citation: Sipho Nkhambule v Choice Center Investments (Pty) Ltd
(172/2021) [2022] SZIC91 (14 July 2022)

Coram: **NGCAMPHALALA AJ**
*((Sitting with Mr.M.P. Dlamini and Mr. E.L.B. Dlamini,
Nominated Members of the Court))*

Date Heard: 5th May, 2022

Date Delivered: 15th July 2022

SUMMARY – Ex parte Application for determination of unresolved dispute- Applicant alleging that his services were unfairly terminated by the Respondent- Applicant’s evidence undisputed due to employer’s failure to attend Court proceedings.

HELD – The Applicant’s evidence meets the standard required for a grant of the relief sought – Application accordingly granted.

JUDGMENT

- [1] The Applicant is Siphon Nkhambule, an adult Liswati male of Shewula in the Lubombo District, a former employee of Respondent.
- [2] The Respondent is Choice Centre Investment, (Pty) Ltd, a limited entity with the capacity to sue and be sued in its own name, duly registered and incorporated in accordance with the company laws of Eswatini carrying business at Lomahasha, in the Lubombo District.
- [3] The present application is one for a determination of an unresolved dispute in terms of **Section 85 (2) of the Industrial Relations Act 2000 (as amended)**. This section provides that;
- “If the unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement or re-engagement of any employee either party to such a dispute may make an application to the Court for determination of the*

dispute, or if the parties agree, refer the matter to the Commission for determination.”

- [4] In the context of labour disputes, an application in terms of **Section 85 (2) of the Industrial Relations Act 2000 (as amended)** is the equivalent of a summons and once the pleadings are closed, the matter is referred to trial where all the parties are expected to present oral, documentary or other legally acceptable evidence in support of their version respectively.
- [5] The Application was served on the Respondent personally on the 28th May, 2021 at 11:25hrs, and subsequently the Respondent's attorneys Magongo Dlamini attorneys attended Court on the 22nd July, 2021, wherein they undertook to file their Replies. The Respondent's attorneys did not attend subsequent hearings, until the matter was referred to the Registrar for allocation of *ex parte* trial date. On the 13th April, 2022 the matter was accordingly set down for an *ex parte* trial, and a notice of set down served on Respondent's attorney of record for the hearing of the matter on the 24th March, 2022. The Respondent was not in attendance.
- [6] The Respondent was thus clearly aware that the matter will be proceeding for trial on the 13th April, 2022 as per the notice of set down but elected not to attend court in order to present its version of the events leading to Applicant's dismissal. The matter was postponed to the 3rd May, 2022, on which date the trial commenced on an *ex parte* basis and judgment was reserved.

APPLICANT'S TESTIMONY

- [7] The Applicant testified under oath, and in the absence of the Respondent his evidence was unchallenged. He stated that he was employed by the Respondent in August, 2019 as a General Labourer at Respondent's store in Lomahasha. It was his evidence that he was in continuous employment until such time Respondent terminated his services on the 2nd March, 2021. It was his submission that there were no written particulars of employment, but at the time of his dismissal he earned E1, 330.00 (one thousand one hundred and thirty Emalangeneni) per month.
- [8] According to the Applicant on the 2nd March, 2021 in the morning he proceeded to work, and unfortunately, he arrived late to work on that day. It was his evidence that it was a muddy day, so he proceeded to wipe his shoes with a piece of cloth to remove the mud. The said piece of cloth had been given to him by the Respondent for cleaning shelves.
- [9] It was his testimony that whilst attending to the cleaning of his shoes, his supervisor Mr. Aaron Patel saw him and reprimanded him for the use of the cloth to clean his shoes, as it was for the shelves. He averred that he tried to reason with the supervisor, by informing him that his shoes were full of mud as it was a rainy day but to no avail, however, the matter was eventually settled. It was his evidence that the supervisor proceeded to report him to the Manager Mr. Asif Patel in his presence, which he did not take kindly to. He then proceeded to enquire from his supervisor as to why he had reported the incident to the manager, as he had assumed that they had resolved the matter because he had reprimanded him.

[10] Applicant stated that this did not go down well with the supervisor who proceeded to assault him. After the assault, it was his submission that his manager proceeded to dismiss him without following due process. He then proceeded to report a case of assault with the police for the supervisor's conduct. He further averred that no disciplinary enquiry was conducted by the Respondent, and he was not given an opportunity to answer to any allegation of misconduct. The Applicant testified that he was not given any notice of termination of his services, further he was never granted any leave during his employment.

[11] It was his submission that he then reported a dispute with the **Conciliation Mediation Arbitration Commission (CMAC)**, wherein he discovered that the Respondent was underpaying him, as according to **The Regulation of Wages (Retail Hairdressing, Wholesale and Distributive Trade industry) Amendment Order, 2018**, he was entitled to a monthly salary of E 1531.70 (One thousand five hundred and thirty-one Emalangeni and seventy cents). During conciliation no consensus was reached and a Certificate of Unresolved Dispute was accordingly issued.

[12] The Applicant has now brought this application before Court seeking that the Court declare the termination of his services to be unlawful and accordingly should be set aside, and that he be accordingly compensated.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[13] The burden of proof lies with the Respondent to prove that the Applicant was fairly dismissed. Further that the grounds upon which the Applicant

was dismissed are *prima facie*, fair and reasonable for dismissal in terms of **Section 36 and 42 of the Employment Act 1980**. In this regard, Grogan J, Workplace Law (9th Ed) at p.123 states that;

“Proof that the dismissal was fair requires the employer to prove on a balance of probabilities that the employee in fact committed the misconduct, or was incapacitated to the degree alleged, as the case may be. The employer must also prove that it complied with the procedural requirements of the type of dismissal concerned... the primary significance of the onus is that when the evidence on a point is evenly balanced or indecisive, the balance will tip against the party upon whom the onus rests.”

[14] The evidence presented by the Applicant shows that he was an employee to whom **section 35(1) of the Employment Act (Supra)** applied. On the Applicants unchallenged evidence, he admitted to using the cloth assigned to him to wipe shelves by the Respondent, for the wiping of his muddy shoes. In his defense he testified that he had been allocated a second cloth by the Respondent and hence assumed that he could use the old cloth for his personal use. Nowhere in his evidence did he state that the Respondent had advised him to dispose of the old cloth or that he could now use the cloth for his personal use, or other use except for the cleaning of shelves.

[15] We are satisfied that the Applicant was able to discharge the onus resting on him which was simply to demonstrate that his services were terminated by the Respondent. But even though his evidence is undisputed the Applicant has failed to prove that his dismissal was substantively unfair, he has

however successfully proven that his dismissal was procedurally unfair in the circumstances. The Applicant's evidence on his entitlement to underpayments and leave is satisfactory and the Court accepts it as proper and lawful. The Court therefore finds that the termination of the Applicant's services was procedurally unfair and he must be compensated accordingly.

The court accordingly makes the following orders;

The Respondent is ordered to pay to the Applicant compensation as follows;

- (i) Notice Pay in the sum of E 1,531.70
 - (ii) Leave pay in the sum of E 1,060.00
 - (iii) Underpayments in the sum of E 3,630.60
 - (v) 4 months' compensation in the sum of E 6,126.80.
- Total Award** **E 12,349.10**

(v) There is no order as to costs.

The Members Agree.



B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. F. Vilakati (Kush Vilakazi & Associates).

For Respondent: No appearance.