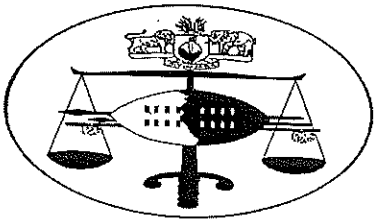

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No 392/2018

In the matter between:

NOMBUSO ZIKALALA Applicant

And

KFC (PIMENTAS) Respondent

Neutral citation: Nombuso Zikalala v KFC (Pimentas) (392/18) [2023] SZIC 132 (22 December, 2023)

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

Date Heard: 24th October, 2023

Date Delivered: 22nd December, 2023

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

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[1] The Applicant is Nombuso Zikalala, an adult Liswati female of Mpolonjeni area, Mbabane, District of Hhohho.

[2] The Respondent is Pimenta's KFC, a company duly registered and incorporated in accordance with the Company Laws of the Kingdom of Eswatini and carrying on business as a franchise food outlet, with its principal place of business, situate at Manzini in the Manzini 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 sometime in December, 2018, the matter was postponed on several occasion to allow the then attorneys of record in the matter Musa M. Sibandze Attorneys to seek instructions in the matter. On the 12th February, 2019 the matter again found its way before Court, and a ruling was issued by Malinga AJ, directing that the matter was to be heard *ex parte*. Somehow after the Ruling the matter was removed from the roll and resurfaced on the 22nd September, 2022, it was postponed on this day to the 7th November, 2022 for a call the attorneys of record for the Respondent were now Robinson Bertram. The matter again was postponed on the 7th November, 2022 to the 14th November, 2022, then again to 21st November, 2022. On the 14th December, 2022 the attorneys of record for the Respondent filed a notice of withdrawal as attorneys of record. The matter was set down for the 1st March, 2023 and the Respondent's were duly served, the Respondent did not appear on the said date and the matter was referred to the office of the Registrar for an *ex parte* trial date in terms of the Ruling as issued by

Malinga AJ. This Court heard the matter on the 5th October, 2023 and set it down for an *ex parte* hearing on the 24th October, 2023, on which date the matter was heard and judgment reserved.

APPLICANTS TESTIMONY

[7] The Applicant testified under oath, and in the absence of the Respondent his evidence was unchallenged. She stated that she was employed by the Respondent on permanent basis on the 8th October, 2008, as an Accountant/ Personal Assistant and Administrator. It was her evidence that she holds a Diploma in Business Studies from the Gwamile Vocational and Commercial Training Institute (VOCTIM).

[8] It was her evidence that she was in continuous employment until such time Respondent terminated her services on the 9th August, 2018. It was her submission that there were written particulars of employment that she signed, however she was never given a copy of same. She testified that at the time of her dismissal she earned E8,774.76 (Eight thousand seven hundred and seventy-four Emalangeni and seventy-six cents) per month.

[9] According the Applicant on the 28th March, 2018 she was verbally dismissed by the Respondent's Director Mr. Pimenta's, through Mr. Mphikeleli Mathunjwa. She accordingly proceeded to report a dispute for unfair dismissal, whereat the Respondent reinstated her to her previous position as Accountant/ Personal Assistant/ Administrator on the 14th May, 2018.

[10] It was her testimony that upon her reinstatement she was not given any duties by the Respondent, but what transpired is that after two (2) weeks of her return to work, she was served with a letter of suspension, and a notice to appear before a Disciplinary Tribunal. The Applicant's attorney referred her to the Notice of Disciplinary Hearing in the bundle of documents as filed by herself. The Applicant however disputed that the Notice before Court was the one that had been used to charge her with. It was her evidence that she was served with a second notice, which is not the one before Court, as the charges as appears in the disciplinary notice before Court, are not the charges she answered to.

[12] The Applicant's attorney provided her with another charge sheet which she confirmed having being the correct one, but same was only filed as evidence by the Applicant's attorney, after having filed its closing submissions. It was her evidence that she was subjected to the Disciplinary hearing, however she could not recall in detail what transpired during the proceedings and the individuals that were present during the proceedings. It was her testimony that the Chairperson was Mr. Fayiya Tengbeh, and her attorney represented her.

[12] It was her evidence that the hearing was held, and thereafter the Chairperson issued out his recommendation, and he was found guilty of the charges, and subsequently dismissed. It was her testimony that her services were then terminated by the Respondent in a letter dated 9th August, 2018. It was her evidence that she was afforded the right to appeal the decision of

the Respondent, but she could not remember what transpired thereafter, save that the matter was eventually reported **CONCILIATION MEDIATION ARBITRATION COMMISSION (CMAC).**

[12] It was her testimony that even though a hearing was held, same was a sham as the chairperson recommended a sanction of dismissal without affording her the opportunity to mitigate after the finding of guilty. Further it was her testimony that both the hearing and the appeal were conspicuously biased in favour of the Respondent, it was her averment that the appeal chairperson simply endorsed the decision of the chairperson of the hearing thus qualifying her apprehension that her dismissal was procedurally and substantively unfair.

[11] It was her submission that she then reported a dispute with **Conciliation Mediation Arbitration Commission (CMAC),** wherein during conciliation no consensus could be reached and a Certificate of Unresolved Dispute was accordingly issued.

[12] She has now brought this application before Court seeking that the Court declare the termination of her services to be unlawful and accordingly should be set aside, and that she 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 she was an employee to whom **Section 35(1) of the Employment Act (Supra)** applied. On the Applicants unchallenged evidence, the Applicant was dismissed and later reinstated to her position as Accountant/ Personal Assistance/Administrator on the 14th May, 2018. From her evidence when reinstated she was not given any work, but was however charged with several offences namely violation of management's right to access company information, gross misconduct and refusal to obey an instruction, gross negligence, forbidden use of internet and company email and unauthorized use of company property, which she averred were for events that happened in 2012. During her evidence the Court noted that the Applicant, could not adequately recollect what transpired during the hearing, further there was uncertainty with the charges which were eventually preferred against her.

[12] Despite the matter being unopposed the Applicants attorney were not able to properly guide the Applicant to prove her case. The Courts has had to

mainly rely on the pleadings as provided by the Applicant in its book of pleadings. We are satisfied that the Applicant was able to discharge the onus resting on her which was simply to demonstrate that her services were terminated by the Respondent. But even though her evidence is undisputed the Applicant has failed to prove that her dismissal was procedurally unfair, this is because from the evidence as adduced by herself, she confirms that she was charged (charge sheet also stated she would be on suspension), called to a disciplinary hearing, allowed representation, and further allowed to appeal the outcome of the disciplinary hearing. the Court however find that she has successfully proven that her dismissal was substantively unfair in the circumstances, in that she was called to answer on charges that had transpired in 2012, and from the conduct of the Respondent leading to her being charged, and the failure on the part of the Respondent to defend the allegations as presented by the Applicant before this Court. The Court has noted that despite it being part of her claim, the Applicant failed to lead any evidence regarding the leave which she alleged in her pleadings was owed to her by the Respondent, and there being no evidence lead, the Court has not made a finding on the leave owed as alleged. The Court accordingly finds that the termination of the Applicant's services was substantively unfair and she 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 8,774.76

(ii) Severance Pay of E 37,606.11

(iii) 6 months' compensation in the sum of E52,648.56.

Total Award **E 99,029.43**

(v)There is no order as to costs.

The Members Agree

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. G. Hlatshwayo (MLK Ndlangamandla Attorneys).

FOR RESPONDENT: No appearance.

[11] In the court's view, the potentiality of irreparable harm to both parties exists. On the one hand the Applicant is likely to be tried and possibly dismissed for a charge that might be time-barred. On the other hand, the 1st Respondent's prerogative to discipline its employee will be put on hold pending an appeal which will be determined at an unknown date in the future while it continues to remunerate the employee who is on suspension with pay.

[12] Although the Applicant has a right to challenge any illegality that occurs in the course of the disciplinary inquiry provided there are exceptional circumstances; in this instance, however, the court was swayed by the lack of prospects and frivolity of the Applicant's appeal in holding that the balance of convenience favours the 1st Respondent and consequently dismissed the application for stay on the 9th October 2023.

[13] The Applicant's counsel has since requested written reasons for the aforesaid ruling of the court and the above-mentioned are the reasons for dismissing the application for stay.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

For the Applicant : Mr. A. Dlamini