

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini REF: SWMZ 469/08

In the matter between;

Happy Simelane Applicant

AND

Far East Textile Respondent

CORAM;
ARBITRATOR : **THULANI DLAMINI**
FOR APPLICANT : **S. MSIMANGO**
FOR RESPONDENT : **S. DLAMINI**

ARBITRATION AWARD

1. Parties and Hearing

The Applicant in this matter is Happy Simelane, an adult Swazi female and former employee of the Respondent.

The Respondent on the other hand is Far East Textiles, a company duly incorporated in terms of the company laws of Swaziland and having capacity to sue and be sued in its own name.

The arbitration hearing proceeded at different dates between the 11th June, 2009 and 30th July, 2009 when it was finally completed.

2. BACKGROUND OF DISPUTE AND ISSUES TO BE DECIDED

The dispute before the Commission relates to the alleged unfair dismissal of the Applicant by the Respondent on the 20th October, 2008. It (dispute) was reported to the commission in terms of section 76 of the Industrial Relations Act, 2000 (as Amended) and was referred to conciliation, where, however, the parties failed to reach an amicable settlement of same. As a result of this, a certificate of unresolved dispute was issued and the parties decided to refer the matter to arbitration, hence my appointment to arbitrate herein.

-2-

3. SUMMARY OF EVIDENCE APPLICANT'S CASE

3.1 TESTIMONY OF HAPPY SIMELANE

The Applicant stated under oath that she was employed by the Respondent as a Layer in September 2003 and that at the time of her dismissal her salary was the sum of E437.00 per fortnight.

Applicant went on to state that she was no longer an employee of the Respondent because she had been dismissed and that the reason for her dismissal was that she had refused to teach a new employee duties of a layer. When quizzed as to who dismissed her she singled out a certain Ncobile Maphalala whom she said told her in the face that 'they were tired of her attitude, so she should leave because she no longer had a job'. She alleges that she was dismissed on the 21st October 2008. She wrote an appeal letter but management, through the same Ncobile who dismissed her refused to accept the letter. She now prays for reinstatement or alternatively; notice pay, additional notice pay, severance allowance and maximum compensation for unfair dismissal.

Under cross examination by Mr Dlamini on behalf of the Respondent the Applicant maintained that she had been dismissed by the Supervisor, Ncobile and that when she was dismissed there was Pholile Mbetse, Lindiwe Vilane and the new employee. She also maintained that the reason for her dismissal was that she had refused to teach the new employee how to do the work she (Applicant)

was doing, which

-3-

allegation she vehemently denies. She stated that on the first day she spent the whole day teaching and inducting the new employee. When Dlamini put it to this witness that she had refused to teach the new employee alleging that she was there to take her job she denied this allegation stating that she had taught her in the best manner possible and was supervising her through out the process.

Dlamini further asked her what her reaction was upon dismissal and she stated that she waited outside Ncobile's office hoping she would change her mind and eventually decided to leave at around 14:30 hours after it became apparent that she would not. Before leaving she had entered Ncobile's office to submit her apron and writing pen. She then came back after 3 days to ask for her letter of dismissal and Pholile advised her to come back on the next Monday to discuss her issue. When she came back on the Monday as advised, Pholile and Ncobile informed her that she should come back the next day and would be employed anew, which she could not agree to.

That was the Applicants case.

RESPONDENT'S CASE

3.2. TESTIMONY OF PHOLILE MBETSE

This witness introduced herself as the Personnel Officer at the Respondent's undertaking. According to the evidence of Mbetse the Applicant was initially employed as a layer and that after some years she was then taught how to record all the sorted material and distribute it in factory lines. At the time she was the only one doing

-4-

this work and the lines were only very few. With time more lines were added and this meant more work and the Applicant could not cope with the added work load. Management then decided that the Applicant needed somebody to assist her in the recording and distribution hence the decision to employ the new employee.

The Applicant was tasked with inducting the new employee, Gab'sile Vilane. On the second day of her employment the new employee approached the acting Supervisor in the department complaining that the Applicant was refusing to teach her how to do the work. The Applicant was called and questioned about the allegation and she arrogantly asked her Supervisors as to what was it that they wanted from her. Seeing that she was 'fuming' the senior Supervisor instructed her to wait outside so she could cool down. The Applicant waited outside the office as instructed but after some time she came back in and informed this witness that she was leaving because she had been dismissed. This witness disputed that the Applicant had been dismissed and stated that she had only been instructed to wait outside since she was fuming and the intention was to eventually discuss the allegation by the new employee.

When she was sought later on to engage her it was discovered that she had left the premises leaving her apron and pen on a table in the office. Mbetse further testified that as proof that the Applicant was not dismissed there was another employee she joined outside, a certain Annette, who had also been instructed to wait outside the office for late coming. She testified further that Management of the Respondent does not believe in arbitrarily dismissing employees but rather in engaging them with the aim of finding what the problem is and

-5-

resolving it. After her disappearance the Applicant only showed up on the 23rd October 2008 demanding that she be given a letter of dismissal. She was advised that she should come back the next day to have her matter discussed and she did not but instead decided to report a dispute of unfair dismissal.

Under cross examination this witness maintained that the reason the Applicant had been told to wait outside was to so that she could calm down seeing that she was fuming, arrogant and insolent. When Msimango put it to her that the reason she was made to wait outside was because she had been dismissed, this witness vehemently denied this assertion. She went on to clarify that in fact it was not the first instance that the Applicant had been made to wait outside and therefore wondered how this time around she came to the conclusion that she had been dismissed? She denied as well that by instructing the Applicant to teach the new employee it was the employer's ploy of getting rid of the Applicant maintaining that it (employer) was not in the habit of arbitrarily terminating services of its employees.

3.3. TESTIMONY OF NCOBILE MAPHALALA

This witness also testified under oath. She stated that she was an employee of the Respondent in the capacity of Senior Supervisor. In her testimony she denied having dismissed the Applicant. Outlining the events of the day in question she stated that she had instructed the Applicant to teach the new employee, Gab'sile Lukhele, how to do the work she had been engaged for. This was after it had become obvious that the Applicant was no longer coping with the work load with the addition of more lines in the cutting department. She went on to

-6-

mention that she personally noticed that the Applicant was not dedicating herself to fully inducting the new employee and she approached and reprimanded her. On the next day she came to work late and was instructed to continue teaching the new employee as she (new employee) was complaining that there was not much she had learnt the previous day.

This witness further testified that as she was going about her duties a supervisor came with the new employee who was weeping and complaining that the Applicant was refusing to teach her how to do the work and as such she wanted to quit. The Applicant was called in and questioned on the allegation by the new employee and she arrogantly and insolently asked them as to what she had done and what is it that they really wanted from her and that she was tired of being falsely accused. She informed her that her conduct was unbecoming and that she was being insubordinate and accordingly instructed to wait outside so she could calm down. She mentioned that it was not the first time that the Applicant had been made to wait outside the supervisor's office to calm down as she always seemed to be get 'hot' under the collar easily.

Apparently when the Applicant was instructed to wait outside there was another employee who had also been given the same instruction and they both waited outside. The Applicant then disappeared and was not heard of for more than three days only to resurface and ask for a letter of dismissal from this witness who however wondered where she got the idea that she had been dismissed. She then apologised and Maphalala advised her to come back the next day but she did not. Maphalala further explained that the whole intention of asking the

-7-

Applicant to come back the next day was to have her re-engaged after disappearing for more than three working days.

Under cross examination this witness denied that the new employee had been engaged to replace the Applicant instead stating that she was employed to assist her by relieving some of the work load from her. Again under cross examination this witness denied that the Applicant was dismissed stating instead that she absconded and even then the company still offered to re-engage her.

3.4. TESTIMONY OF LINDIWE VILANE

This was the Respondent's third witness. She testified under oath that she was an employee of the Respondent having been engaged in the year 2004 as a Layer in the cutting department. She went on to mention that the Applicant was responsible for recording all the sorted material and distribute it in factory lines. However, after the addition of more production lines work then became too much for the Applicant such that she was failing to meet the demand of efficiently distributing to all the factory lines.

This witness further testified that management then decided to employ Gab'sile Lukhele to assist the Applicant. Since Gab'sile did not know the work, the Applicant was tasked with inducting her. Vilane further testified that she observed that the Applicant appeared uninterested in teaching Gab'sile how to do the work as she would look away from her instead of concentrating on whether she was indeed learning what she was imparting to her. As acting Supervisor she then approached the

-8-

Applicant and requested her to help the new employee as she was there to assist her.

Her request however seems to have fallen on deaf ears because she was later approached by the new employee complaining that the Applicant was not teaching her how to do the work. And when she approached the Applicant again she (Applicant) sarcastically told the new employee that if she was not coping she should leave. Vilane then decided to hand the matter over to senior management and when the Applicant was called to the senior Supervisor's office she arrogantly informed the senior Supervisor that she was tired of being falsely accused as it seemed that everybody was on her case. She was then instructed to wait outside since she was 'fuming'. Under cross examination it was put to this witness that she was part of a conspiracy against the Applicant and she denied this assertion stating that she had nothing against the Applicant and had only testified on what she had perceived.

3.4. TESTIMONY OF GAB'SILE LUKHELE

This was the Respondent's fourth witness. She testified under oath that she was employed by the Respondent company in July 2009 to record sorted material and distribute it to the factory lines. Upon being employed she was taken to the Applicant and informed that she (Applicant) would teach her how to do the work. Indeed she went to her work station but the reception she got from the Applicant was hostile. In her own words she stated as follows;

-9-

"I went to my work station and I found the Applicant there, I informed her that I had been directed by the senior Supervisor to be inducted by her and requested her to teach me and she informed me that she could not teach me and she walked away to another table. I followed her to the other table and persisted in my request that she teaches me but she still refused saying she would be fired once she taught me and from there she ignored me and continued with her work".

Gab'sile further testified that she then informed the acting Supervisor about the Applicant's refusal and she (Supervisor) approached the Applicant about her refusal. From there the Applicant became even more hostile even going to the extent of throwing a file at her telling her to record the sorted material in it and she wondered how she expected her to do so without teaching her as instructed. On the next day the Applicant came to work late and when she did this witness still persisted with her request to be taught the work and she still refused. It was Gab'sile's further evidence that out of frustration she eventually opted to report her predicament to management and they were both summoned to the senior Supervisor's office. Once there the Applicant informed the Supervisors that she was tired of them and that they should leave her alone and was told to wait outside, after which she apparently disappeared from work. After her disappearance she (Gab'sile) was approached by a lady by the name of Fundi, also an employee of the Respondent, who accused her of being responsible for the Applicant's resignation.

Under cross examination by Msimango on behalf of the Applicant this witness stood steadfast in her evidence maintaining that the Applicant

-10-

did not teach her anything instead she saw her as a threat in that she was of the ill-conceived idea that she was there to take her job.

3.5. TESTIMONY OF ANNETTE SIMELANE.

This was the fifth and final witness of the Respondent. Her evidence, under oath, was that she had

come late on a particular day and was made to wait outside so that she could be spoken to (reprimanded) about her conduct. Whilst outside, she was joined by the Applicant. Apparently as they were standing outside waiting to be called in, the Applicant said she could not wait indefinitely outside as she felt she was being made a fool by the Supervisors. She left saying she would take her matter up with her lawyer who would sort them out.

Under cross-examination Msimango put it to this witness that she was also part of a conspiracy against the Applicant and had been schooled to testify against her and she vehemently denied this allegation stating that she had nothing to gain by lying under oath and against the Applicant especially because she did not have anything against her.

That was the Respondent's case.

4. ANALYSIS OF EVIDENCE AND ARGUMENTS

The Applicant, through her attorney, submitted in very brief closing submissions that the Applicant had made a clear and probable case of unfair dismissal against the Respondent, disputing the employer case that she had deserted her work. It was further submitted by Msimango that the Respondent's witnesses contradicted themselves as to the

-11-

reason for the engagement of the new employee. He wondered why the Applicant was tasked with training the new employee and argued that all this was a ploy to get rid of her. He also raised the issue of the Applicant being re-engaged when she returned to her work place for a letter of dismissal, stating that this was proof that she had been dismissed otherwise the offer for re-engagement would not have been made.

In countering the above submissions by the Applicant's representative Mr. Dlamini, on behalf of the Respondent, started off by reciting what he considered crucial aspects of his witnesses' evidence. He then went on to state that the Applicant's assertion that she was dismissed is void of any element of truth. It was further submitted that she deserted work and that this was done as a means of concealing her defiant conduct of refusing to train the new employee. And in order to determine if the Applicant failed or refused to obey a lawful instruction, the test is to establish whether the instruction given was both reasonable and lawful under the circumstances. Dlamini then quickly pointed out that the instruction meets the both requirements of the test which made the Applicant's refusal to carry it out unlawful.

I was then referred to section 36 (f) of the Employment Act which stipulates thus;

"It shall be fair for the employer to terminate the services of an employee because the employee has absented his or herself from work for more than a total of three working days in any period of thirty days without either the permission of the

-12-

employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions"

And in relation to the above quoted section of the Act the Respondent's representative submitted that the Applicant absented herself from work without permission following her failure to carry out a lawful and reasonable instruction. This was tantamount to desertion and had the effect of terminating the employment contract between the parties.

The question which remains to be answered in relation to this case therefore is whether the Respondent has shown that it has satisfied the requirements of section 42 (2) of the Employment Act. Section 42 (2) provides;

"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".

The provisions of the above quoted section have to be read together with those of section 36 of the same act, which spells out the fair reasons for the termination of an employee's services.

-13-

Conning to the case at hand, it is common cause that the Applicant was tasked with training the new employee on the 20th October 2008. The evidence before me further points out that the Applicant did not induct the new employee as instructed because she feared that she was there to take her job. Frustrated by the Applicant's conduct the new employee approached her Supervisors to register her frustrations and the Applicant was summoned to the Supervisors' office. When questioned about the allegations against her she became agitated and was instructed to wait outside so she could cool down. After waiting outside for some time she decided to leave now alleging that she had been dismissed. She came back on the third day and asked for her dismissal letter and was advised to come back on the next Monday to sort out her issue. And on the Monday she was informed that she would be re-engaged, which she did not agree to hence her decision to lodge a dispute alleging unfair dismissal.

Under common law, employees are required to render their services to their employer. And wilful absence from work constitutes a breach of contract and justifies summary termination of the contract. However, even then, the employer is still saddled with the obligation of convening a disciplinary inquiry before simply deciding that by absenting himself the employee has terminated the employment contract.

Surtherland, AJ, in *South African Broadcasting Corporation v CCMA and Others* (2001) ILJ 487 at 492 stated as follows;

"The real problem arises from circumstances of unexplained absence. Mere absence is no more conclusive

-14-

pointed out and stressed that the dividing line between absenteeism and abscondment or desertion is quite thin and is flexible.

It is therefore my finding that the Applicant was entitled to be heard before a decision that she had automatically terminated her services could be reached. From the evidence before me it is quite obvious that the Applicant was never dismissed as she alleges, instead she decided that by making her stand outside she was being mocked and left claiming that her attorney would sort them out. But even then, the evidence before me is that she came back on the third day of her disappearance, and the Supervisors informed her that she had absented herself for more than three working days (which was incorrect) and as such should come back the next day to be employed afresh. The employer should have charged and conducted a disciplinary hearing against her to determine her guilt or otherwise instead of simply informing her that she had terminated the employment contract by absconding. This therefore means that the termination of the Applicant's services was procedurally unfair but substantively fair.

That her termination was procedurally unfair does not, however, entitle her as of right to an order reinstating her to her position. In the case of *NATIONAL UNION OF METALWORKERS OF SA & ANOTHER V BARLOW TRACTORS CO* (1992) 13 ILJ 1281 (IC) De Kock M at page 1285 stated as follows;

"The court must, even where it finds that the termination of employment constitutes an unfair labour practice,

-16-

determine whether the applicant is entitled to a remedy and if so what the nature of the remedy should be."

Taking into account all the evidence presented before me it is my finding that the Applicant is not entitled to an order of reinstatement herein but rather for compensation for the procedural defect.

5. CONCLUSION

Our law of dismissal is governed by section 42 of the Employment Act read in conjunction with section 36 of the same Act. In terms of section 42 (2) of the said Act, the onus to prove that an employee was fairly terminated rests with the employer, and it does not only end there but such termination has to be one permitted by section 36. It is therefore my well considered view that in this case the inherent probabilities support the Applicant's assertion that his dismissal was procedurally unfair, and that, however, substantively it was fair.

6. AWARD

The Applicant has claimed the following: Reinstatement or alternatively

- (a) Notice pay
- (b) Severance allowance and
- (c) Additional notice
- (d) Maximum compensation for unfair dismissal.

However I make an award as follows;

That the Respondent pays to the Applicant;

-17-

- a) Two (2) months compensation for the procedurally unfair termination of her services = E 1,748-00
- b) The rest of the Applicant's claims against the Respondent are dismissed.

The aforesaid amount is due and payable forthwith.

DATED AT MANZINI ON THIS 04TH DAY OF DECEMBER 2009.

THULANI DLAMINI CMAC

COMMISSIONER

-18-