



## **CONCILIATION MEDIATION AND ARBITRATION COMMISSION**

**HELD AT NHLANGANO**

**REF NO: NHO 062/16**

In the matter between:

**NIKIWE MAVIMBELA**

**APPLICANT**

**AND**

**PIMENTA'S KFC**

**RESPONDENT**

### **Coram**

**ARBITRATOR : NONHLANHLA SHONGWE**

**FOR APPLICANT : VELAPHI MAGAGULA**

**FOR RESPONDENT : BANELE GAMEDZE**

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### **ARBITRATION AWARD - 13 - 02 - 18**

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### **DETAILS OF HEARING AND PARTIES**

1. The arbitration hearing was held on the 11 and 9 July 2016, 11 August 2016, 8 September 2016, 4 and 25 October 2016, 15 November 2016, 1 and 13 February 2017, 2 June 2017 at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC), Lankhosi Building in Manzini. The matter was heard in Manzini at the request of the parties for convenience.
2. The Applicant is Nikiwe Mavimbela, an adult Swazi female of Nhlanguano in the Shiselweni district. She was represented by Mr.

Velaphi Magagula a Labour Consultant from Mavee Labour Consultant who took over the matter from Mr. Thulani Tsabedze a Labour Consultant from TL Partners & Associates after he withdrew his services as the Applicant's representative.

3. The Respondent is Pimentas KFC, trading as KFC, a company duly incorporated in terms of the company laws of Swaziland and is located in Nhlanguano in the Shiselweni district. Mr. Banele Gamedze, an attorney from the law firm Musa Sibandze Attorneys based in Mbabane, represented the Respondent.

### **ISSUE TO BE DECIDED**

4. The issue for determination is whether the dismissal of the Applicant was procedurally and substantively fair.

### **BACKGROUND FACTS**

5. The Applicant was employed by the Respondent as a Team Member on the 22 December 2008 and was in continuous employment until her dismissal on the 13 May 2015. At the time of dismissal, the Applicant was earning a monthly salary of E2, 263.04.
6. Subsequent to her dismissal, the Applicant reported a dispute for unfair dismissal to the Commission. The dispute was conciliated; however, it remained unresolved and a Certificate of Unresolved Dispute was issued by the Commission. The parties requested for arbitration and I was subsequently appointed to determine the dispute through arbitration.
7. The Applicant is seeking the following relief:

7.1	Notice pay	E 2, 263.04
7.2	Unlawful Suspension	E 4, 526.08

7.3	Additional notice pay	E 2, 437.12
7.4	Severance allowance	E 6, 092.80
7.5	Maximum compensation the unfair Dismissal	E27, 156.48

8. The issue of unpaid wages during suspension was settled by the parties and a Memorandum of agreement was signed to that effect.
9. The Respondent is opposed to the Applicant's claims as it contends that the dismissal was fair and it follows therefore that she is not entitled to the relief sought.

### **SURVEY OF EVIDENCE AND ARGUMENTS**

10. The Applicant and Charles Simelane gave evidence in support of the Applicant's case and the Respondent led the evidence of Mxolisi Mamba who is employed by the Respondent as a Restaurant General Manager at Nhlngano.

### **APPLICANT'S CASE**

#### **EVIDENCE OF THE APPLICANT (AW1)**

11. It is prudent to fore mention that the Applicant gave differing versions of account to the events leading to her dismissal such that the matter had to be postponed numerous times to allow the Applicant to compose herself. In all the sessions she gave a different account or contradicting statements to the point where her representative withdrew his services. I have however made an attempt to reconstruct her version of events, taking into account that the onus is after all with the Respondent, hers is to prove that she was dismissed.
12. The Applicant testified under oath that around 26 November 2015 she fell ill and she went to consult a Herbalist who prescribed her timbita which is a traditional herbal mixture. The Herbalist then gave her a sick note which booked her off sick for

eleven days. She stated that she submitted the sick note to Mxolisi Mamba her Manager on the same day.

13. The Applicant testified that when she went to consult the Herbalist, she was not aware that he was a traditional Herbalist.
14. All was well until about 7 March 2015 wherein she was served with a notification to attend a disciplinary enquiry scheduled for 10 March 2015. She was also suspended without pay effective on the day of the notification.
15. On 10 March 2015 being the date of the hearing, the Applicant was asked by the Chairperson Mr George Langa if she had a representative. She told Mr Langa that she had engaged Mr Thulani Tsabedze who could not attend on the day due to short notice. The hearing was then postponed to 18 March 2015 to secure the presence of the Applicant's representative.
16. On 18 March 2018 the Applicant attended the hearing with her representative Mr Thulani Tsabedze. She stated the Chairperson ruled that Mr Thulani Tsabedze was not qualified to represent her as he was not an employee of the Respondent. According to the Applicant, her colleagues had refused to represent her for fear of victimization. She said she had approached Charles Simelane. It was her testimony that since there were no Shop Stewards, she engaged the services of a Labour Consultant.
17. After the Chairperson had ruled against the presence of Mr Thulani Tsabedze, she then handed him a letter dated 10 March 2015 marked "A5" requesting to be provided with the Disciplinary Code and Procedure. She further requested for an external representative as she could not source someone from within the workforce. It is said that the Chairperson disregarded her pleas and ordered for the hearing to proceed.

18. She was found guilty and dismissed. The dismissal was upheld on appeal. During her appeal hearing, she was allowed to bring a representative of her choice and she was represented by Mr Thulani Tsabedze.
19. The Applicant testified that other employees who submitted sick notes from the Herbalist were dismissed except for Ndumiso Zikalala. Therefore she felt the employer was not consistent in disciplining employees who committed the same offence. The Applicant further stated that the sanction of dismissal was harsh as her length of service was not considered.
20. When asked during cross-examination if she was privy to the circumstances around the case of Ndumiso Zikalala, she responded that she was not. The Applicant testified that she approached Charles Simelane to represent her at the hearing but he refused because he was afraid of Mxolisi Mamba. She admitted that she was working with twenty four other employees and she never approached any of them.
21. During re-examination, she testified that Charles Simelane had agreed to represent her should he be invited to attend.

#### EVIDENCE OF CHARLES SIMELANE (AW2)

22. The witness took an oath and testified that he was employed by the Respondent on 28 September 2013 as a Cook based in Manzini. On 28 January 2015 he was transferred to Nhlanguano where he worked until his dismissal on 5 March 2015 for committing an offence similar to that of the Applicant. Two other employees, Nkosinathi Matse and Menzi Dlamini were also dismissed for the same offence except for Ndumiso Zikalala. It is said Ndumiso also submitted sick notes from the same Herbalist but was never charged instead he was rewarded with a transfer to work at the Gables at Ezulwini.

23. The witness testified that he was referred to the Herbalist operating under the name Two Sticks Herbalist by Ndumiso Zikalala. Ndumiso also told him that he had also submitted sick notes from the Herbalist to the Respondent without being questioned and he was paid for the sick days.
24. As per his colleague's advice, he went to consult the Herbalist on 8 August 2015 and 8 September 2015. He was given sick notes which he presented to the employer and they were accepted without question. He was also paid for the sick days.
25. The witness clarified that the said Herbalist is actually a Traditional Healer known as an Inyanga in vernacular.

## **RESPONDENT'S CASE**

### **EVIDENCE OF MXOLISI MAMBA**

26. His evidence under oath was that, he has been working for the Respondent as a Restaurant Regional Manager in Nhlangano for about six years.
27. He testified on the events leading to the Applicant's dismissal that it all started after the Applicant submitted a sick note from a non-existent chemist. It all started sometime in November 2015 after the Applicant reported sick and was absent for nine days. The Applicant had not submitted her sick note and Sibusiso Shongwe who was the Shift Supervisor called the Applicant requesting her to submit her sick note from Itshelejuba Hospital which booked her off sick for purposes of preparing the time sheet for payroll.
28. On 26 November 2015, the Applicant submitted a sick note from Two Sticks Herbalist which booked her off sick for a further eleven days over and above the nine she had been absent on.

29. According to the witness, they specifically asked for a sick note from Itshelejuba Hospital because the Applicant had submitted a sick note from Itshelejuba Hospital which did not give her time off.
30. On 8 November 2015, the witness was instructed by Mr Dupont the Area Coach to request the Applicant to submit a sick note from Itshelejuba Hospital. He asked the Applicant as per Mr Dupont's instruction. It is said that the Applicant left and returned with a sick note from Itshelejuba Hospital giving her only a day off.
31. The witness was then tasked by the Area Coach to investigate if the Herbalist was in existence. In his investigation, he discovered an indumba which is a Traditional Healer's consultation room. He reported his findings to Mr Dupont and the Respondent tasked Wonder Dlamini to make further enquiries from the Ministry of Health if the said chemist was registered with government. The Ministry responded to their enquiry by letter dated the 11<sup>th</sup> February 2016 marked "A6", which stated that the said facility was not in law authorized to certify employees unfit for duty and it further advised the Respondent to caution its work force against producing sick notes from the said facility.
32. Subsequently, the Applicant was charged for submitting a sick note that was not in compliance with the Company policy. The witness testified that he personally served the Applicant with the Notification to Attend a Disciplinary Hearing marked "A4" and he personally took time to read it to the Applicant and explain the rights as contained therein.
33. According to the witness, there is a duly recognized Union within its establishment called SEIWU and they had Stop Stewards duly appointed by the employees. Even though he could not confirm if the Applicant was a member of the Union, there were Shop Stewards she could have approached if she needed a

representative. The Company allows employees to be represented by a fellow employee of their choice, however the accused employee is required to notify the company timeously to facilitate the presence of the representative. The Applicant did not approach the witness to request for the release of a fellow employee and or Shop Steward to represent her.

34. The witness testified that Charles Simelane, Mazwi Dlamini and Nkosinathi Matse were all dismissed for the same offence. Charles Simelane was dismissed in absentia after he failed to appear at his hearing. With regards to Ndumiso Zikalala, he testified that as far as he was aware, Ndumiso never submitted a sick note from the Herbalist.
35. During cross-examination he was asked if the Applicant was cautioned against producing a sick note from the Herbalist as per the recommendation contained in the letter from the Ministry of Health in exhibit "A6". He testified that she was charged.

## **SUBMISSIONS**

36. At the close of the Respondent's case both counsel elected to make written submissions which only the Applicant duly complied. The Respondent despite numerous reminders and indulgence to do so failed to submit their submissions.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

37. The Applicant was charged and found guilty of submitting a sick note from a non-existing chemist. She was subsequently dismissed and her appeal was unsuccessful. The Applicant is now challenging the procedural and substantive aspects of her dismissal. The Respondent has opposed the Applicant's claim on the basis that her dismissal was procedurally and substantively fair.



38. I am now required to determine the procedural and substantive fairness of the dismissal. Section 42(2) of the **Employment Act of 1980, as amended** provides that:

*“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.*

### SUBSTANTIVE FAIRNESS

39. The Applicant challenged her dismissal on two substantive grounds: that the sanction of dismissal was harsh and that the Respondent has not been consistent in disciplining employees who committed the same offence.
40. It is common cause that the Applicant was charged and subsequently dismissed by the Respondent for submitting a sick note from a non existing chemist. The Applicant does not dispute that she submitted the said sick note to her employer, her main gripe is that another employee Ndumiso Zikalala was never disciplined for submitting a sick note(s) from the same herbalist yet she was dismissed. That, according to the Applicant was unfair inconsistency on the part of the Respondent.
41. In support of this contention, the Applicant had undertaken to call Ndumiso Zikalala as a witness but was later withdrawn after she changed counsel. The Commission had already subpoenaed the said Ndumiso and even the Respondent had made an undertaking to release him for purposes of appearing before the Commission. Instead she called in Charles Simelane who also confirmed that he was also charged and dismissed for committing a similar offence.

42. The **Code of Good Practice: Termination of Employment** Clause 6.3 requires consistent application of discipline by an employer. The Clause reads as follows:

*“The employer should apply the sanction of dismissal consistently with the way in which it has been applied to the same and other employees in the past and consistently as between two or more employees who in similar circumstances participated in the misconduct under consideration.”*

43. This rule is often referred to as the “parity principle”. The hallmark of this principle is that all things being equal it is generally unfair to dismiss an employee for an offence that the employer has habitually or frequently condoned in the past (i.e. historical inconsistency) or to dismiss some of a number of employees guilty of the same misconduct (i.e. contemporaneous inconsistency). Historical consistency requires employees to be treated the same as employees who committed the same offences in the past whereas contemporaneous consistency requires all employees who have committed the same misconduct at the same time to be treated equally. See in this regard **Grogan J. Workplace Law (9<sup>th</sup> Ed)** at page 162.

44. In **Gcwesha v CCMA & Others [2006] 3 BLLR 234 (LAC)**, the Labour Appeal Court per Nicholson JA held that:

*“Disciplinary consistency is the hallmark of progressive labour relations and the ‘parity principle’ merely requires that every employee must be measured by the same standards. Discipline must also not be capricious nor should there be any perception of bias when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated and the disciplinary record of the two employees compared. No extraneous matters should be regarded and a comparison has to be made between all the relevant features that are normally considered when one employee is disciplined.”*

45. In **SRV Mill Service (Pty) Ltd v CCMA & Others [2004] 2 BLLR 184 (LC)**, it was held that, inconsistent treatment is likely to produce in the minds of interested and impartial observers alike a perception of unfairness and, possibly, one of bias or ulterior purpose. It is for this reason that the explanation of the differentiation is essential, if the different outcomes are both to survive. The court further stated that it is not part of the law on consistency that bias or ulterior purpose must be established before a disciplinary outcome can be said to be inconsistent to the point that it impacts on the requirement of fairness. One of the reasons underlying the need for consistency is that the perception of bias should be avoided.
46. When an employee raises an inconsistency challenge, the onus is on the employer to explain why different sanctions were meted out to employees guilty of the same offence or why other employees who committed the same offence were not disciplined. In other words the employer bears the onus to that it acted consistently. See: **Rustenburg Platinum Mines Ltd (Bafokeng Rasimone Platinum Mine) v CCMA & others [2006] 11 BLLR 1104 (LC)**
47. In this matter, it is common cause that the Applicant together with three other employees namely; Charles Simelane (RW2), Nkosinami Matse and Mazwi Dlamini, were all dismissed for a similar offence. Both the Applicant and Charles Simelane's evidence was that, one of the employees Ndumiso Zikalala who also submitted a sick note(s) from the Herbalist to the employer was not disciplined by the employer but was transferred to another duty station. The Applicant conceded under cross-examination that she was not certain if indeed Ndumiso Zikalala committed the alleged offence other than the transfer to the Gables. This basically shows that the Applicant's contention about Ndumiso was speculative.
48. The Respondent on the other hand has disputed this allegation outright. Mxolisi Mamba's testimony who was the Manager in charge, denied that Ndumiso Zikalala ever submitted a sick note

from the Herbalist. Initially the Applicant had included the said Ndumiso Zikalala as part of her witnesses. A subpoena had already been issued and served upon him twice but the Applicant decided to withdraw him at the eleventh hour for reasons best known to her.

49. There is no tangible evidence before the Commission to prove that the said Ndumiso Zikalala committed a similar offence other than the allegations made by the Applicant and Charles Simelane. The Applicant had the opportunity to call Ndumiso Zikalala to prove this assertion but decided not to at the last minute. Even though the onus was on the Respondent to prove that it acted consistently, the Applicant had an opportunity to prove the inconsistency when it made an undertaking to call Ndumiso Zikalala. An adverse inference should therefore be drawn against the Applicant for her failure to call Ndumiso Zikalala to testify.
50. The Respondent throughout its case maintained that it was consistent in meting out discipline to all employees who submitted sick notes from the Herbalist. In fact the Applicant in her own evidence admitted that three of her colleagues were also dismissed. This goes to show that there was no differential treatment meted out to these employees, as they were all dismissed.
51. With regards to the harshness of the sanction, the Applicant did not substantiate as to how the sanction was harsh other than her length of service. The Applicant was dismissed for submitting a purported sick note from a Herbalist when asked to present a medical certificate from a medical practitioner. Section 130 of **The Employment Act 1980** states that sickness of an employee can only be certified by a Medical Practitioner through a certificate of incapacity which is commonly referred to as a sick note or sick sheet.

52. It is not in dispute that the dismissal of the Applicant emanates from a sick note that was issued by someone not authorized under our law to do so. The Applicant herself also admitted that she consulted a Traditional Healer who prescribed timbita for her ailment.
53. The issue of Traditional Healers' certificates has been a topic of much contentious debate regarding whether or not an employer should accept the certificate as being valid. There are no known cases where employers ceremoniously accepted medical certificates from traditional healers in Swaziland. Whereas even in the modern society we live in, we still have a large portion of our populace with deep rooted cultural beliefs who still believe in traditional herbs. Especially where there is a belief that the illness is not a conventional medical condition. To a certain extent most of those people consult traditional healers before consulting modern medical health facilities or vice versa. Sadly, it remains a moot point as presently medical or attendance certificates from Traditional healers are not recognized in our jurisdiction.
54. The South African Labour Appeals Court ruled in favour of a woman who was fired from work for absenting herself for a month. The case in point is, **Kiviets Kroon Country Estate (Pty) Ltd v Mmoledi & others [LAC] JA78/10**), where an employee was dismissed because she stayed away from work, among others, because she had a medical certificate from a traditional healer saying that she had 'premonitions of ancestors', the CCMA and the Labour Court declared that the employee's dismissal was unjustified, as she had a justifiable reason for her unauthorized absence. When the case was taken on appeal, the Labour Appeal Court stated, among others, that as the Constitution recognizes traditional beliefs and practices, others should reasonably accommodate others' beliefs and not trivialize them.

55. It is important to note that in the above case the employee did not undergo 'medical treatment' and it was more a case of cultural, traditional belief or ancestral consultation. The employee's case was based on her cultural and/or traditional beliefs that she was in consultation with a Traditional Healer to assist her to undergo some sessions that would qualify her to be a Sangoma as she had a calling from her ancestors.
56. In light of the foregoing, the conclusion is inescapable that the Applicant's dismissal was substantively fair.

#### PROCEDURAL FAIRNESS

57. The Applicant challenged procedure on the basis that the chairperson of the disciplinary hearing was biased and that she was not allowed to be represented by a representative of her choice.
58. The general position of our law and practice of industrial relations is that, an accused employee is entitled to be represented by another employee or a member of that employee's union in a disciplinary hearing. (See Clause 11.4 of **The Code of Good Practice: Termination of Employment.**)
59. The accused employee is not however entitled as a matter of right to be represented by a legal practitioner or external representation at this stage, it being an internal disciplinary process conducted by an employer against its employee.
60. By way of guidance, the Industrial Court in the case of **Ndoda H. Simelane v. National Maize Corporation case No. 453/06 (IC)** pointed out that there are considerations that should be taken into account by the chairperson in deciding whether legal or other external representation is indispensable in ensuring a procedurally fair hearing. They are as follows;
  - a) *Whether a fellow employee of equal status to the applicant is available to represent him;*

- b) if not, whether representation by a subordinate would be unreasonably degrading to the applicant and/or hamper him in the presentation of his defence;*
- c) whether an employee of the organization can satisfactorily represent the interests of the applicant in circumstances where the Chief Executive Officer is the complainant;*
- d) in circumstances where external representation is appropriate, whether it is reasonable to restrict the applicant's choice to an employee from another local parastatal;*
- e) whether the charges are sufficiently complex or legalistic as to warrant the involvement of an attorney;*
- f) whether the charges may result in the dismissal of the applicant;*
- g) whether the respondent will be unreasonably prejudiced if the applicant is permitted a representative of his choice, and in particular a legal representative;*

61. These considerations are by no means exclusive. The parties may raise other factors, and the chairperson may exercise his discretion taking into account all issues which he may consider relevant.
62. The Applicant was served with a notification to attend a disciplinary hearing on 7 March 2015, which was scheduled for 10 March 2015 marked exhibit "A4". Bullet four under the subheading employee rights of the Notification, states amongst other rights recorded therein, the right to representation by a fellow employee. The Applicant in her evidence and cross-examination maintained that after her representative Thulani Tsabedze was rejected by the chairperson of the disciplinary hearing, she asked Charles Simelane a colleague to represent her. She stated that Charles refused to represent her for fear of victimization.

63. Later in re-examination she recanted and testified that Charles Simelane had agreed to represent her if they invited him to the hearing. Charles Simelane was called in to testify during the arbitration to corroborate the Applicant, particularly on the issue of representation. Instead the witness corroborated the issue of consistency that he was also dismissed for submitting a sicknote from the same Herbalist. It was never put to the witness if he was ever approached by the Applicant to represent her at the disciplinary hearing.
64. In addition to that, Mxolisi Mamba's uncontroverted testimony was that the Respondent had a staff compliment of about 28 employees at the time which the Applicant could have approached to represent her. There is also a Union, SEIWU which was recognized in the year 2015, a year before the Applicant was dismissed and there were Shop Stewards which the Applicant could have utilized if she was not a member of the recognized union.
65. I was intrigued by the Applicant's own deceit. Throughout her testimony she kept changing her testimony to the point where I had no clear understanding of her version. Her own testimony was marred by inconsistency, which she herself could not keep up. At some point she would keep quite when sought for clarity which drove her Representative to withdraw his services. Up to this point I am not certain as to her grounds in support of her contention that she was deprived of her right to representation.
66. That being said I am still required to make an assessment based on the evidence at my disposal. Exhibit "A4" of the Applicant's bundle being the Notice of Disciplinary Hearing, at bullet four under heading 'employee rights' informs the Applicant of her right to representation by a fellow employee. Mxolisi Mamba also testified that he specifically read the notification to the Applicant when he served her. The Applicant was also read her rights by the chairperson of the disciplinary hearing at the hearing as



evidenced in the minutes of the disciplinary marked “A2”. I have taken the minutes to be what they purport to be, as they have been discovered by the Applicant and there was no objection on their veracity. I am entitled to refer to the contents and place some circumstantial value that is relevant to the issue before the Commission. (See in this regard: **Zephania Ngwenya v. Royal Swazi Sugar Corporation (IC) Case no. 262/01**). Therefore, I fail to find any merit in this contention and it is my finding that the Applicant’s dismissal was procedurally fair.

### **RELIEF**

67. Having found that the dismissal of the Applicant was substantively and procedurally fair, I make the following award:

### **AWARD**

68. The Applicant’s dismissal was procedurally and substantively fair.

69. The Applicant’s case is dismissed in its entirety.

**DATED AT MANZINI ON THIS THE 13 FEBRUARY 2018**

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**NONHLANHLA SHONGWE**  
**CMAC ARBITRATOR**