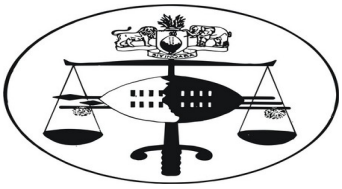

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 4/18**

In the matter between:

BAYLOR COLLEGE OF MEDICINE CHILDREN'S FOUNDATION Appellant

And

SEBENZILE ZIKALALA Respondent

Neutral citation: *Baylor College of Medicine Children's Foundation v Sebenzile Zikalala (4/18) [2018] SZICA 05 (03 May 2018)*

CORAM: **N. MASEKO AJA**
D. TSHABALALA AJA
C. MAPHANGA AJA

FOR APPELLANT: **F. TENGBEH (S.V. MDLADLA ATTORNEYS)**
FOR RESPONDENT: **N.D. JELE (ROBINSON BERTRAM)**

HEARD: 18 APRIL 2018
DELIVERED: 03 MAY 2018

Preamble: *The Respondent was dismissed from work for absenteeism, it being alleged that she was absent from duty for three (3) days on the 1st, 29th and 30th September*

2011 – whether in terms of Section 36 (f) read together with Section 42 (1) and (2) (a) (b) of the Employment Act of 1980 as amended the Respondent was dismissed fairly – whether the court a quo correctly found that the Respondent was unfairly dismissed by Appellant on account of the positive steps she took of reporting to the Appellant of her inability to report for duty – Duty of Appellant to prepare the Record of Proceedings as per provision of Rule 21 (1) of the Industrial Court of Appeal Rules of Cross-Appeal on costs which sere erroneously omitted by the court a quo.

Held: *That the court a quo correctly found that dismissal of the Respondent by the Appellant was both procedurally and substantively unfair, hence the Appeal is dismissed.*

Held further: *That the cross-appeal on costs succeeds as this was erroneously omitted by the court a quo.*

[1] This is an appeal against the judgement of the court a quo delivered on the 7th February 2018. On the 27th February 2018, the Appellant noted the appeal on the following grounds;

1. That the Honourable Court a quo erred in law in holding that the Applicant was unfairly dismissed.

2. That the Honourable Court *a quo* erred in law in holding that the Respondent misdirected itself in finding the Applicant guilty of absenteeism.

3. The Honourable Court *a quo* erred in law in holding that the application of Section 36 (f) of the Employment Act 5/1980, the Respondent was obliged in law to consider the reasonableness of the explanation for absenteeism

HISTORY OF THE MATTER

[2] The Respondent was employed by the Appellant on a two year renewable contract with effect from the 1st December 2010. She was dismissed from employment by the Appellant on the 30th November 2011 after a disciplinary hearing wherein she was found guilty on the two counts of absenteeism.

[3] It is common cause that the disciplinary hearing was chaired by a Senior Attorney Mr. Mbuso Simelane and equally the initiator was also another Senior Attorney in Mr. Noel Mabuza. These two attorneys are not employees of the Appellant.

[4] Upon realisation that she was faced with two attorneys, the Respondent engaged Motsa – Manyathi Attorneys , to represent her,

however it is common cause that her attorneys were not allowed to represent her during the disciplinary proceedings. In fact even her colleagues could not represent her because of fear of victimization by the Appellant. As stated above the Respondent was found guilty on the two counts of absenteeism and dismissed on 30th November 2011. She then reported the mater to the Conciliation Mediation and Arbitration Commission (CMAC) wherein a Certificated of Unresolved Dispute was issued on 20th February 2012 and then the Respondent successfully launched an application before the court ***aquo***, which has resulted in this appeal before us.

PROCEEDINGS BEFORE THE COURT *A QUO*

[5] The status of the proceedings before the Court a quo was clearly and authoritatively explained by Nkonyane J in this matter at paragraph 19 page 9 of the Judgement of the court a quo as follows;

> ***"The Industrial Court does not sit as a review Court for disciplinary hearing proceedings. The Industrial Court sits to hear the dispute de novo and makes its own findings of fact and law."***

[6] The Respondent who was the *dominis litis* before the court *a quo* testified under oath and gave a detailed account of the facts which resulted in her being charged for absenteeism on two counts and ultimately dismissed by the Appellant on the 30th November 2011.

[7] As regards Count 1, she testified that on the 1st September 2011 she was in the Republic of South Africa to register for a course in Psychology. On the 2nd September 2011 she reported for duty whereupon she went to report her predicament to Treasure Mabhena at Human Resources where she also requested to fill the leave form in order to normalize that situation. Treasure did not come back to her and she assumed the issue was sorted. It must be pointed out that Treasure Mabhena was not called to testify on behalf of the Appellant, and therefore the court a *quo* correctly found that Respondent's evidence explaining her absence remains intact and unchallenged.

[8] The Respondent testified further that on the 23rd September 2011 her child was bitten by a dog and rushed to RFM hospital in Manzini.

This was a Friday and she was due to start her leave on Monday 26th September 2011. However due to the condition of the child and lack of medication at the RFM Hospital on 27th September 2011 she then asked her colleague Mbali Dlamini to report her to Dr. Terry Litty who was her immediate supervisor about her predicament and also to request to extend her leave days. The response from Mbali was that Dr. Terry had responded that there was no problem to her request.

[9] She testified further that on the Wednesday 28th September 2011, she personally talked to Dr. Terry over the phone about her predicament, and Dr. Terry said there was no problem and that she should take care of the child and not rush because Mbali was available. She testified further that on the following Monday the 3rd October 2011 she reported for duty and was immediately called by Dr. Terry who was in the company of the Human Resources Officer wherein she was instructed to write a letter and explain her absence from work. She duly complied with that instruction and submitted the letter. About an hour later she was served with a letter of suspension and notification of a disciplinary hearing dated the very same day the 3rd October 2011. The two counts were also included in the letter.

[10] It is common cause that the Respondent was only absent from employment from the 29th and 30th September 2011, I must mention that the 1st September 2011 appears in count 1 and also appears in count 2 as a stand alone date. This is the date when the Respondent was in the Republic of South Africa to register for her Psychology course and was delayed due to transport problems.

[11] The Respondent was subjected to a lengthy and searching cross – examination, however she maintained her evidence in chief and answered the searching cross-examination to the best of her ability. The court a quo noted her demeanor as being honest and forthright. At paragraph 19 line 4 page 9, His Lordship Nkonyane J states as follows;

> ***"On the evidence led before the court, there was nothing that could make the court not to accept the explanation given by the Applicant for her absence on 1st September 2011. The Applicant appeared to the court as an honest and forthright witness. Where she was shown to have given a contradictory version, she readily accepted that and attributed it to the passage of time as the dispute arose about five years ago. The court will therefore come to the conclusion that the dismissal of the Applicant based on count 2 was unfair."***

[12] After completing leading her evidence, she closed her case. Dr. Terry was called as witness for the Appellant. She confirmed that Mbali Dlamini reported to her the Respondent's predicament. She confirmed further that the Respondent informed her of her son's illness on the 29th September 2011. In her evidence in chief she agreed that Respondent notified here about the dog bite incident. Mbali Dlamini was not called as a witness.

[13] The court a quo dealt with the evidence of Dr. Terry in this manner at paragraph 24 – 25 pages 10 – 11 of the Judgement as follows;

> ***"According to the Applicant, she called Mbali Dlamini on Tuesday 27th September 2011. Mbali Dlamini did not testify in court to dispute this evidence. Mbali Dlamini did not call back the Applicant to tell her that she did not transmit the message to the Respondent's superiors. There was also no evidence that the Respondent's management advised the Applicant that her request for the extension of the leave days was not accepted. During cross-examination RW1 Dr. Terry Lynette Litty admitted that she did get the message from Mbali Dlamini. She was however not sure whether it was on the 27th September 2011 or the 29th September 2011. In her evidence in chief, RW1 told the court that the Applicant talked to her in the morning hours on the 29th September 2011. RW1 did not tell the Applicant that her request was not acceptable and that she should report for duty on that day. During cross-examination RW1 agreed that as a mother, she understood the position that the Applicant was in.***
>
> ***Mbali Dlamini was the Applicant's colleague. She was not a junior employee like a cleaner or messenger. It was therefore not unreasonable for the***

Applicant to ask her colleague and to trust her that she would duly transmit the message to RW1. After RW1 got the request for the extension of the leave days, whether on 27th or 29th September 2011, she did not respond and advise the Applicant that her request was not accepted and that she was expected to report to work."

[14] I am also in full agreement with the analysis of the evidence by the court *a quo* in particular the following as appears in the judgement at paragraph 26 page 11 that;

"The employer did receive the Applicant's request to extend her leave days on account of the emergency that she was faced with

The employer did not tell the Applicant that the request was not acceptable

The employer knew where the Applicant was and also knew exactly the reason why she had not been able to report for duty."

[15] I must state that nothing turned on the evidence of RW 2 Leonard Siphiwa Dlamini. It appears from the record of proceedings that he was neither a nurse nor a pharmacist to effectively testify on vaccines for rabbies. The evidence of the Respondent that her son was bitten by a dog and had to undergo treatment for rabbies was also supported by documentary evidence, and no evidence whatsoever was led by the Appellant to challenge its authenticity.

Mr Jele who appeared for the Respondent prepared detailed Heads of Argument and further submitted that the court a quo held and correctly so that dismissal of the Respondent was both procedurally and substantively unfair and awarded her E96 000-00 (Ninety Six Thousand Emalangeni) as compensation for unfair dismissal. He submitted that the dismissal was procedurally unfair because she was denied legal representation and that she was not afforded an opportunity to appeal. He submitted that the dismissal was substantively unfair because the Respondent had offered a reasonable explanation of her absence in that she was taking care of her child who had been bitten by a dog on the 23rd September 2011 and that the dismissal was therefore unreasonable. Further that she had sent her colleague Mbali Dlamini, and further called her supervisor Dr. Litty, to request the extension of leave days.

[16] At page 12 paragraph 28, the court *a quo* referred to a similar matter of ***Vusie Hlatshwayo v University of Swaziland Case No. 218/1999 (IC)*** where the court stated that;

"Considering especially that the Applicant had suffered a dog bite, it was most unreasonable to dismiss him for absenting himself from work while he was undergoing treatment for the wound, regardless of his past record.

Employers must treat employees with an open mind whenever they address specific instances of misconduct. Failure to do so may lead to gross injustices occasioned by lack of objectivity and biased perception about the employee based on his past. This in our view happened in this case resulting in an unlawful dismissal both in substance and procedure"

[17] It is common cause that in *casu* it was not the Respondent who had been bitten by the dog but her son. As stated above, this explanation was not denied but instead it was conceded that she had reported the terrible situation she was faced with.

[18] In the case of ***The University of Swaziland v The President of the Industrial Court & Vusi Hlatshwayo Civil Appeals No. 16/2002*** (this being an appeal to the judgement of Vusie Hlatswayo referred to *supra*) **Beck JA** stated the following at pages 1- 3

'The 2nd Respondent was dismissed from his employment in February 1998 on the grounds of having contravened Section 36 (f) of the Employment Act 1980, which section reads as follows:
36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons:-

(f) Because the employee has absented himself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a Medical Practitioner certifying that he was unfit for work on those occasions"

The operation of Section 36 (f) is qualified by the provisions of section 42 (2) (a) and (b) of the Employment Act.

Those provisions read thus: 42 (2) 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 service of the employee.

Accordingly, the Industrial Court, when seized with an issue of whether or not an employee's service has been fairly terminated in accordance with the provisions of Section 36 (f) and 42 (2) (a) and (b) of the Act, has the duty of applying its mind to whether or not it has been proved that the employee absented himself from work for more than three working days in any period of thirty days without either the permission of the employer or a medical certificate that he was unfit for work on the days he was absent. If satisfied that this has been proved, the Industrial Court must further apply its mind to whether or not taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee."

See also: ***Musa Mnisi v Royal Swaziland Sugar Corporation Case No. 296/2005 (IC). Swaziland Electricity Board v Collie Dlamini Case no. 2/2007 (ICA)***

[19] I must point out that the Respondent was absent from duty on the 1st September 2011 and advanced a reasonable explanation for her absence. Again on the 29th and 30th September 2011 she advanced a reasonable explanation and this is supported by her reporting timeously to Mbali and RW1 Dr. Terry that she was still attending to her sick child as she was the only one dealing with that predicament. This was conceded to by Dr. Terry during her testimony. Section 36 (f) provides for a situation where an employee would be absent for more than three days in a thirty day period without either the permission of the employer or a certificate of a medical practitioner certifying that he was unfit for work on those occasions. Section 42 (2) (b) provides a further qualification in that, the court dealing with the matter is urged to take into account all the circumstances of the case to consider if it was reasonable in these circumstances of the cast to terminate the services of the employee. In *casu* the Respondent did not absent herself for more than three days, instead she was absent for three days. Even if there were no explanations advanced by the Respondent, she would still not qualify to be dealt with on the basis of Section 36 (f), unless of course there would be other factors. On the merits of this case it was unfortunate

that she was charged and subjected to a disciplinary hearing and dismissed as if she had been absent for more than three (3) days, yet she was not. I have no doubt in my mind that the Respondent was unfairly treated by the Appellant during the disciplinary hearing which resulted in her dismissal. Her dismissal from employment was therefore unlawful both in substance and procedure.

[20] As stated above in this judgment, Respondent's circumstances are such that she was able to adequately and reasonably explain her absence before the court *a quo* and the court duly accepted her explanations as clearly demonstrated in the record of proceedings that she reported and requested for extension of her leave days to enable her to attend to her injured son, and that on the 1st September 2011 she had transport problems coming back to the country from the Republic of South Africa.

APPLICATION FOR A POSTPONEMENT OF APPEAL BY THE APPELLANT

[21] As I stated above in this judgment the Appellant lodged an appeal on the 27th February 2018, and same was served on Respondent's attorney on the 1st March 2018.

On the 9th March 2018, the Honourable Judge President acting on the powers as vested in him by Section 3 (1) of the Industrial Court of Appeal Rules, duly issued a directive on the sitting of the Industrial Court of Appeal and further attached the Roll of cases to be heard in the session. The directive reads as follows:

1. **The first session of this Industrial Court of Appeal will commence on the 3rd April 2018 and end on the 3rd May 2018**

2. **The roll is annexed hereto**

3. **Take notice that no postponement will be entertained except for good cause shown and properly motivated in open court.**

[22] It is common cause that the roll is circulated to all legal practitioners in the country.

On the same day the 9th March 2018, the Registrar issued a Notice in terms of Rule 14 of the Industrial Court of Appeal of 1997 and it read as follows;

1. **Be pleased to take notice that the Honourable Judge President has directed that the 1st Session of the Industrial Court of Appeal is scheduled to take place from the 3rd April to the 3rd May 2018.**
2. **Appellants are directed to file and serve Heads of Argument and a list of the main authorities to be quoted in support of each Head in terms of Rule 22 (1) and (2)**

3. **Respondents shall file and serve Heads of Argument and list of main authorities to be quoted in support of each Head in terms of Rule 22 (3)**

4. **The attention of Practising attorneys is drawn to Rule 21 with regard to the timeous lodging and certification of proceedings.**

5. Attorneys are urged to comply with time limits set in this notice.

[23] It is common cause that this notice from the Registrar was also circulated to all Legal Practitioners.

[24] I must point out that the appeal in *casu* was scheduled for hearing on the 17th April 2018 at 14:30 hrs.

[25] On the 6th April 2018, the Appellant attorneys filed an application for the postponement of the appeal to the next session on the ground that they wanted to secure the audio recording of the trial. In fact by letter dated the 3rd April 2018, Appellant's attorneys had written to the Registrar requesting for a speedy retrieval of the audio recording.

[26] The Registrar responded and promptly advised the Appellant's attorneys that the audio recordings of these proceedings were irretrievable and therefore the parties were to use the Judge's notes to compile the record. The Registrar advised further that the Appellant

was to approach her office for the Judge's notes. However I must mention that the Appellant's attorney did nothing thereafter.

[27] On the other hand the Respondent filed a Notice to Oppose the Application for postponement of the Appeal on the 9th April 2018 and further filed an Answering Affidavit on the 12th April 2018. The Appellant did not file a Replying Affidavit nor any Heads and Bundle of Authorities to motive their application for a postponement of the Appeal as per the directive from the Judge President.

[28] In fact on the 9th April 2018 the Respondent's Attorneys wrote to the Appellant's attorneys suggesting a reconstruction of the Record using the Judges notes, because the Learned Judge *a quo* kept detailed notes which can be used to prepare the Record for the Industrial Court of Appeal. Further the Respondents made it perfectly clear to the Appellant's Attorneys that any postponement for the appeal was vigorously opposed. Respondent's attorneys further stated that, as of that date (09th April 2018) the Appellant had not even filed the Book of Pleadings and Exhibits of this matter.

[29] I must mention that the Record of Proceedings that was eventually compiled by the Respondent's attorneys from the Learned Judge's notes *a quo* was very comprehensive and produced an informative record as if it was from the audio recording. This court is greatly indebted to Respondent's attorneys for that professionalism and assistance to the court.

[30] On the 17th April 2018 the Appeal was enrolled for 14:30hrs. Upon the matter being called, Mr. Tengbeh for the Appellant moved his application for a postponement of the Appeal to the next session, on the ground that the record was incomplete because the audio recording was irretrievable. Mr, Jele for the Respondent vigorously opposed the application on the ground that the Transcript of Proceedings has been prepared from the Judge's notes which are comprehensive and adequate. Mr. Jele argued further that the application for the postponement was a strategy by the Appellant to frustrate the Respondent from executing her order.

[31] The matter was postponed to the 18th April 2018 at 11:30hrs and Mr. Tengbeh was ordered to prepare his Heads of Argument and to argue

the matter on 18th April 2018 since the Record of Proceedings which they were supposed to prepare and file had already been filed by the Respondent.

[32] On the 18th April 2018 at 11:30hrs the matter was recalled and Mr. Tengbeh indicated that he had not complied with the Court Order to prepare the Heads and was not ready to argue the matter. He informed the Court that he has launched an urgent application before the High Court to stay the appeal proceedings before us. When asked to produce the order for stay of these proceedings, he indicated that the matter was yet to be heard by the duty Judge. The matter was adjourned until 12:00 noon to enable Mr. Tengbeh to put his house in order by either serving the Court with the order of stay of proceedings from the High Court or proceed with the matter as all matters enrolled this session were supposed to be heard, and more so because the Record of Proceedings was before Court.

[33] The Court recalled the matter at 12:05pm and Mr. Tengbeh was not able to serve us with the order of the Stay of the Proceedings. He also

did not file his Heads and he submitted that he was not going to make any submission. The matter proceeded and judgment was reserved.

RECONSTRUCTION OF THE RECORD OF PROCEEDINGS.

[34] The duty to prepare the Record of Proceedings in the Industrial Court of Appeal is governed by Rule 21 of the Industrial Court of Appeal Rules of 1997.

[35] Section 21 (1) provides as follows:

> (1) The Appellant shall prepare the Record on appeal in accordance with sub-rules (5) and (6) hereof and shall, within one month of the date of noting of the appeal, lodge a copy thereof with the Registrar of the Industrial Court for certification as correct.

[36] As this peremptory rule clearly dictates that it is the Appellant that has to prepare the Record within one month of lodging the Notice of Appeal and lodge a copy with the Registrar.

[37] The Appellant did not comply with this Rule. The Appellant did not even attempt to reconstruct this record from the Judge's Notes, notwithstanding the advice from the Registrar.

[38] Instead it was the Respondent who ended up preparing the record of proceedings from the Judge's notes and filing all the other relevant process, on the other hand all that the Appellant had to do was file their Heads of Argument. This matter is not a matter with a bulky record of proceedings. The time allocated to Mr. Tengbeh to file Heads was sufficient in the circumstances and bearing in mind that Appellant should have prepared and lodged the Record and also file their Heads even earlier than the Respondents. However no Heads of Argument were filed by the Appellant's attorneys.

[39] I must point out that after the Appellant indicated that they would apply for a postponement of the Appeal because the audio recording was irretrievable, the Respondent's attorneys took it upon themselves to prepare the Record of Proceedings from the Judge's notes and also compiled and filed the other relevant processes before court.

[40] The court processes were filed in this manner:

(i) Bundle of Exhibits filed with Registrar on 10th April 2018 and served on Appellant's Attorneys on 10th April 2018 at 14:47hrs.

(ii) Transcript of Proceedings filed with Registrar on 11th April 2018 and served on Appellant's Attorneys on 11th April 2018 at 11:22hrs.

(iii) Book of Pleadings filed with Registrar on 11th April 2018 and served on Appellant's Attorneys on 11th April 2018 at 11:22hrs.

(iv) Book of Authorities filed with Registrar on 13th April 2018 and served on Appellant's Attorneys on the 13th April 2018 at 14:34hrs.

THE CROSS APPEAL:

[41] The Respondent filed a cross appeal as regards the issue of costs which were omitted to be dealt with before the court *a quo* after a Notice of Intention to Amend together with the amended Application for determination of Unresolved Dispute was filed in court and served on Appellant on the 27th July 2016.

[42] The Respondent pursued this matter of costs after the court had delivered its judgment, and the court *a quo* dismissed that application on the basis that it had no power to review its own judgment. The Respondent then filed a Cross - Appeal to the main appeal filed by the Appellant on the following grounds

1. The court *a quo* erred in law in not awarding the Respondent costs of suit as she claimed same in the amended statement of claim.
2. The court *a quo* erred in law in not awarding the Respondent costs as she was successful in her claim.

[43] At Paragraph 11 of the Judgement on costs delivered on the 29th March 2018, the Learned Judge *a quo* states as follows:

> ***'It has now been shown that it was an error on the part of the Court to say in its judgement that there was no prayer for costs as the evidence has now shown that the statement of claim was amended to incorporate the prayer for costs. However any correction of the order will clearly have the effect of changing the sense or substance of the order that the court made. The view of the court is that the change or correction that this court is being called upon to make is not a minor correction or clarification of the order, but it will amount to the court reviewing its own order, changing it from one of "no order as to costs" to one of judgement with costs. This court has no power to review its own judgment.'***

[44] I am comforted by the realisation of the court a quo that it had been shown that the error not to grant the prayer for costs was on the part of the court *a quo* because the amendment incorporating the prayer for the said costs had been filed before court and was part of the pleadings.

[45] I am therefore of the considered view that this is a clear case wherein this court having considered all the circumstances of the case, it is prudent, fair and reasonable that costs are awarded to the Respondent on the ordinary scale. In the premises the following order is hereby granted.

1. The appeal by the Appellant is dismissed with costs
2. The cross Appeal by the Respondent succeeds with costs
3. The Judgment of the court *a quo* is varied to read "The Applicant is awarded costs of the application

N. MASEKO AJA

I agree **D. TSHABALALA AJA**

I also agree **C. MAPHANGA AJA**