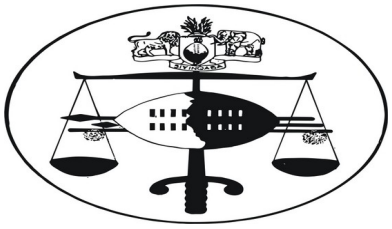

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 154/2012**

In the matter between:

SEBENZILE ZIKALALA Applicant

And

BAYLOR COLLEGE OF MEDICINE
CHILDREN'S FOUNDATION SWAZILAND Respondent

Neutral citation: *Sebenzile Zikalala v Baylor College of Medicine Children's Foundation Swaziland (154/2012) [2018] SZIC 08 (February 07 , 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions : 08/12/17

Delivered judgement: 07/02/18

SUMMARY---Labour Law---Applicant employed in terms of two-year fixed term contract---Applicant dismissed before the expiration of the contract period on alleged grounds of absenteeism and dishonesty in terms of Section 36(f) of the Employment Act of 1980 as amended.

Held---It is unreasonable for an employer to adopt a mechanical interpretation of Section 36(f). The employer must consider the reasonableness of the explanation tendered by the employee for the absence.

JUDGEMENT

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1. This is an application for determination of an unresolved dispute between the Applicant and the Respondent in terms of Section 85 (2) of the **Industrial Relations Act No.1 of 2000** as amended.

2. The Applicant is an adult Swazi female of Manzini in the Manzini Region. The Respondent is a Non-Profit Making Organization which carries on its business at Kent Rock in Mbabane in the Hhohho Region.

3. The Applicant was employed by the Respondent in terms of a two-year fixed term contract commencing on 01st December 2010. She was employed as a Pharmacy Technician. She remained in

continuous employment until she was dismissed by the Respondent on 30th November 2011 before the expiration of the two year contract period.

4. The Applicant was of the view that her dismissal by the Respondent was both substantively and procedurally unfair. She therefore reported the matter to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation and a certificate of unresolved dispute was issued by the Commission.

5. The Applicants application was opposed by the Respondent which duly filed its Reply thereto. The Respondent denied that the dismissal of the Applicant was unfair. The Respondent stated in its Reply that the dismissal of the Applicant was substantively and procedurally fair.

6. **THE EVIDENCE:-**

The Applicant was dismissed by the Respondent by letter dated 30th November 2011. The dismissal was recommended by the chairperson of the disciplinary hearing wherein the Applicant appeared facing two charges. The Applicant pleaded not guilty to both charges. Count 1 was a charge of absenteeism it being alleged that she absented herself from work for three days on 01st, 29th and 30th September 2011 without prior approval of her supervisor. In Count 2 she was charged

with dishonesty it being alleged that she was dishonest in her explanation of the reason for her absence on 01st September 2011.

7. The Applicant pleaded not guilty on both counts. She had no representative during the disciplinary hearing. She told the Court that her colleagues declined to represent her because they feared victimization by the employer. The Applicant instructed a firm of attorneys to represent her. The application to have legal representation was refused by the chairman. The chairman and the initiator are legal practitioners. The Applicant therefore faced two experienced legal practitioners. She was found guilty and dismissal was recommended. The Respondent adopted the recommendation of dismissal and the Applicant was dismissed.

8. **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-**

The Respondent is a Non-Profit Making Organization (NGO) dealing with health related issues and is specializing in the treatment of children and mothers. It relies on donor funding and Government subvention. The Applicant was employed by the Respondent as a Pharmacy Technician. There was no evidence that she has any legal training. She was served with a letter of suspension dated 03rd October 2011. The letter of suspension contained the details of the charges and also advised her of her right to be represented by an employee of her choice. Her colleagues declined to represent her for fear of victimization as they would be facing the employer at the

hearing. The chairman was an experienced legal practitioner and the initiator was also a seasoned legal practitioner.

9. From the evidence before the Court, the chairman simply contented himself with the fact that the Applicant was advised of her right to be represented by a fellow employee at the hearing. In her evidence in chief, the Applicant told the Court that she did advise the chairman that she was unable to secure a work colleague to assist her. The chairman told her that the hearing should proceed and that they were going to assist her if she had any problem with the language. The chairman did not give the Applicant an opportunity to seek a representative from outside the institution. There is no doubt in the mind of the Court that there was no equality of arms during the disciplinary hearing taking into account that the Respondent was represented by a legal practitioner and the chairman was also a legal practitioner.

10. The Applicant instructed a firm of attorneys to represent her. They applied to the chairman to be allowed to represent the Applicant. The chairman dismissed the application.

11. After the hearing the Applicant was dismissed by letter dated 30th November 2011. The Applicant told the Court that she was never advised of her right to appeal. Indeed, in the letter of termination it was not stated anywhere that the Applicant had the right to appeal. The Court therefore has no hesitation in accepting the Applicant's evidence that she was never advised that she had the right to appeal.

12. As already pointed out, the chairman was a seasoned legal practitioner. The Respondent was also represented by an experienced legal practitioner. In the circumstances of this case, it was clearly unfair for the chairperson to refuse the Applicant the right to be represented by a legal practitioner. The evidence also revealed that the Applicant was not afforded the opportunity to appeal. It cannot, therefore, be said that the disciplinary hearing was fairly conducted taking into account the evidence that;

12.1 The chairman of the disciplinary hearing was a seasoned lawyer and the Respondent was represented by an experienced lawyer, but the Applicant was refused legal representation.

12.2 The Applicant was not afforded the opportunity to lodge an appeal against the decision to dismiss her.

13. In the circumstances of this case, it cannot be said that the dismissal of the Applicant was procedurally fair. The Court will accordingly come to the conclusion that the dismissal of the Applicant was procedurally unfair.

14. On Count 1 the Applicant was facing the following charge;

"You are hereby charged with misconduct in that you absented yourself from work for a total of three days on the 1st, 29th and 30th September 2011 without prior approval of your supervisor after which

you failed to report to the admin office to have those days deducted from your annual leave.

On Count 2 the charge appeared as follows:-

"You are hereby charged with dishonesty in explaining the reason for your absenteeism on the 01st of September 2011 in saying that you were held in South Africa with your studies while you were seen in Mbabane on the 31st of August 2011 in the afternoon".

15. The Applicant told the Court that she went to South Africa on 31st August 2011. She told the Court that she had gone there to register for a course in Psychology. She said she was unable to return on the following day on 01st September 2011. She said the reason was that she arrived late in Swaziland due to circumstances beyond her control as the Kombi delayed its departure and eventually left South Africa at 2:00 P.M. She told the Court that when she finally returned to work on 02nd September 2011 she reported her predicament to the Human Resources Manager, Treasure Mabhena. She said she requested Treasure Mabhena to fill the day that she was not at work as her leave day. She told the Court that Treasure Mabhena told her that she was first going to consult her superior Mr. Clinton Simelane. The Applicant said Treasure Mabhena did not come back to her. The Applicant told the Court that she assumed that the Human Resources Manager had filled the day as part of her leave days taken.

16. The Human Resources Manager, Treasure Mabhena did not testify before the Court. The Applicant's version of what took place when the Applicant returned to work therefore remained intact. During cross examination the Applicant maintained her evidence. Her evidence was not shown to be untrue or improbable.

17. It was put to the Applicant that one of the Respondent's employees, Sandra Thomas-Magongo did see the Applicant at Clicks in Mbabane on 31st August 2011. The Applicant denied that. Again, the Respondent did not call Sandra Thomas–Magongo to testify before the Court. From the record of the disciplinary hearing, Sandra Thomas-Magongo testified at the hearing that she left work at 4:00 P.M. because she was taking her breastfeeding hour. Assuming for a moment in favour of the Respondent that Sandra Thomas–Magongo did see the Applicant in Mbabane on 31st August 2011, there was no evidence however that the Applicant did not thereafter leave for South Africa on that day. It follows therefore that even if Sandra Thomas-Magongo was called to testify before the Court that she did see the Applicant around Mbabane on 31st August 2011, her evidence could not have taken the Respondents case any further without any evidence that the Applicant did not thereafter leave for South Africa.

18. The Applicant was not probed further during cross examination as to what caused her not to be able to return to Swaziland on 31st August 2011. Without any evidence that the Applicant was not telling the truth that she went to South Africa on 31st August 2011, the Court is unable to come to the conclusion that the explanation that she gave

about her absenteeism on 01st September 2011 was dishonest. In an application for determination of unresolved dispute where the Applicant claims that her dismissal was unfair, the burden of proof that the dismissal was for a fair reason is on the employer. ***(See:- Section 42(2) and (b) of the Employment Act number 5 of 1980 as amended.)*** Taking into account all the evidence presented by the Respondent before the Court, the Court is unable to come to the conclusion that the Respondent was unable to prove on a balance of probabilities that the Applicant was dishonest in her explanation of the reason for her absence on 01st September, 2011.

19. 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. 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 01st 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.

20. As regards Count 1, the evidence revealed that the Applicant left the workplace on Friday 23rd September 2011 at the usual knock-off time. She had already signed leave form to be away for three days on 26th, 27th and 28th September 2011. She then got a telephone call from a

neighbour in Manzini that her son had been bitten by a dog and taken to hospital. The Applicant then rushed to Manzini Raleigh Fitkin Memorial Hospital (RFM). The Applicant's son was treated and given days to come back to the hospital for reviews. Having been treated on 23rd September 2011, the next days for review were 27th and 30th September 2011.

21. The Applicant said that on seeing that the condition of the child was bad, she decided to request for extension of the leave days up to 30th September 2011. The other reason that the Applicant requested for the extension of the leave days was that there was no vaccine for rabies at the RFM Hospital. She told the Court that she eventually contacted a friend at the Central Medical Stores in Matsapha who assisted her with the vaccine.

22. The Applicant therefore did not report for duty on 29th and 30th September 2011 because she was still taking care of the child.

23. The Applicant was already on leave. She was therefore not at work when she requested for the extension of her leave days. She told the Court that she called and also sent a message to her colleague Mbali Dlamini and asked her to forward her request for the extension of the leave days to Dr. Terri Lynette Litty.

24. 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 to the Applicant to tell her that he 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. Terri Lynette Litty admitted that she did get the message from Mbali Dlamini. She was however not sure whether it was on the 27th September 2011or 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.

25. Mbali Dlamini was the Applicant's colleague. She was not a junior employee like a cleaner or a 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.

26. The evidence before the Court is that;

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

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

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

27. The evidence that the Applicant's son was due to be reviewed by the medical personnel at the RFM Hospital on 27th and 30th September 2011 was not disputed. The evidence that the Applicant's son was not able to walk properly on his own and needed the Applicant's support or assistance was also not in dispute.

28. The present matter is similar to that which the Court dealt with in the case of **Vusie Hlatshwayo V University of Swaziland, case No. 218/99 (IC).** The only difference is that in that case it was the Applicant (Vusie Hlatshwayo) who was bitten by a dog and was unable to report for duty. He was charged and found guilty of absenteeism. The Court however found that his dismissal was unfair. *In casu*, it was not the Applicant but it was her child that was bitten by the dog. At page 9 the Court in that case 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."

29. In casu, it was not the Applicant but her child that had suffered the dog bite. The evidence that the Applicant was the only one available to take care of the child was not disputed. The Respondent adopted a mechanical interpretation of Section 36 (f) of the Employment Act which provides that it shall be fair for employer to terminate the services of an employee;

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

30. It was unreasonable for the Respondent to apply a mechanical interpretation of the Section and not consider the reasonableness of the explanation tendered by the Applicant for her absence.

31. In the present case, for reasons lost to logic, the Respondent seems to have failed to consider the reasons tendered by the Applicant for her absence. More than that, the Applicant had sent a request to extend her leave days in order for her to attend to the emergency that she was then facing of having to attend to her child who was bitten by a dog. The Respondent's management did not tell her that the request was

not acceptable and that therefore she was required to come back to work immediately.

32. The evidence by RW2, Leonard Siphiwa Dlamini did not take the Respondent's case any further. He was called to testify that the vaccine for rabies was available at the RFM Hospital during the period relevant to this matter. RW2 had no first-hand information of what he was telling the Court. He is not a nurse or a pharmacist. He relied on a stock sheet. The Applicant's evidence was that she was told by the nurse who treated the child that there was no rabies vaccine at the RFM Hospital. The Applicant's evidence that the child was in a bad state was not disputed. There was no evidence by the Respondent that it was not possible to find the nurse who attended to the Applicant's child or the pharmacy personnel to dispute the Applicant's evidence. The Court will therefore accept the Applicant's version because;

32.1 It was highly unlikely that the Nurse who attended to the Applicant's child could have told a lie and say that there was no vaccine for rabies and unnecessarily put the life of the patient at risk.

32.2 It was highly unlikely that the Applicant would not have had the child vaccinated if the vaccine for rabies was available.

32.3 The Applicant herself said the child was in a bad state. The Court finds it highly unlikely that the Applicant could have taken a risk with the life of her own child.

33. There was also evidence before the Court that the Applicant did report to the Human Resources Manager's Office when she returned to work on Monday. She told the Court that the Human Resources Manager told her to first consult with her supervisor, RW1. When this was put to RW1 during cross examination, she said she could not comment on that as she was not there. The Human Resources Manager was not called as a witness before the Court. On a balance of probabilities the Court will accept the Applicant's version as RW1 agreed that she would breastfeed for about twenty minutes at the car park. The Applicant's version that she looked for RW1 at the instruction of the Human Resources Manager but did not find her and that she (Applicant) returned to her duty station is therefore more probable.

34. On the totality of the evidence before the Court, the Respondent misdirected itself in finding the Applicant guilty of absenteeism on 29th and 30th September 2011. The Applicant should not have been found guilty on Count 1.

35. The Court will accordingly come to the conclusion that the dismissal of the Applicant was both substantively and procedurally unfair.

36. **RELIEF:-**

The Applicant told the Court that after her dismissal life changed drastically. She was unable to pursue her studies. She had problems finding new employment because of her record of dismissal by the Respondent. Her dependents were also affected as she could not

financially assist them. She stayed for about two years without finding alternative employment.

37. The Applicant was employed in terms of two year fixed term contract with effect from 01st December 2010. The full term of the contract therefore was due to end on 30th November 2012. The Applicant was unlawfully dismissed on 30th November 2011. She therefore had twelve months remaining in her employment contract. The Court will accordingly order that she be paid the salary she would have earned had she not been unlawfully dismissed by the Respondent. There was no prayer for costs in the Applicant's application. The Court will therefore make no order as to costs.

38. **Order:-**

The Respondent is pay to the Applicant the sum of ***E96, 000:00*** representing the amount that the Applicant would have earned had the employment contract not been unlawfully terminated by the Respondent. There is no order as to costs.

39. The members are in agreement.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *Mr. N.D. Jele*

(Attorney at Robinson Bertram)

For Respondent: *Mr. S.V. Mdladla*

(Attorney at SV Mdladla & Associates.)