



CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

SWMZ 139/15

In the matter between:-

NONHLANHLA SHONGWE

APPLICANT

And

FASHION INTERNATIONAL SWAZILAND (PTY) LTD

RESPONDENT

CORAM:

Arbitrator	:	Ms K. Manzini
For Applicant	:	Mr.B. Mkoko
For Respondent	:	Ms. B. Nxumalo
Arbitration Dates	:	29-01-2016, 23-02-2016, 07-03-2016, 15-04- 2016, 13-05-2016, 31-05-2016

ARBITRATION AWARD

{06-07-2016}

1. PARTIES AND REPRESENTATION

- 1.1 The Applicant herein is Ms. Nonhlanhla Shongwe, a Swazi female adult of Mbikwakhe Matsapha, within the Manzini Region. The Applicant was represented by Mr Bongani Mkocho, a Labour Consultant.
- 1.2 The Respondent is Fashion International Swaziland (Pty) Ltd, a company duly incorporated in terms of the Laws of Swaziland. The Respondent's chief place of business is 5th street & 7th Avenue, Matsapha Industrial Site, Manzini Region. Ms Buyisile Nxumalo the company's Human Resources Officer represented the Respondent.

2 ISSUES IN DISPUTE

- 2.1 According to the Certificate of Unresolved Dispute No. 201/15, the matter is one of alleged unfair dismissal wherein the Applicant claims the following:-
- i. Reinstatement or alternatively:-
 - ii. Notice pay - E1, 355.20
 - iii. Additional Notice - E2, 439.36
 - iv. Severance Allowance - E6, 098.40
 - v. December wages (2 days) - E 135.52
 - vi. Maximum compensation for unfair dismissal - E16, 022.40
- 2.2 The Applicant claims that her dismissal was unfair not only substantively, but in terms of procedure as well. The Respondent refuted these claims in their entirety, and alleged that the Applicant was dismissed for being absent from work, without authorization from the employer from the 12th of January, 2015 until the 9th of February, and that by the time she returned her position had already been filled.

3 SURVEY OF EVIDENCE

- 3.1 The Applicant's representative called the Applicant as well as Ms Vuyisile Simelane to testify in support of his case.
- 3.2 The Respondent's representative called Ms Calisile Sibandze to testify in support of the Respondent's case. Both parties relied on documentary evidence as well.

4 THE APPLICANT'S CASE

4.1 THE TESTIMONY OF MS NONHLANHLA SHONGWE

- 4.1.1 The Applicant testified under oath that she was employed by the Respondent on the 8th of August, 2005, where she worked as a Presser. She testified that she received an income of E350.00 per week, and per fortnight she earned E700.00. She stated that she had experienced bouts of ill-health from February, 2014, but had ultimately been hospitalized during the Christmas holidays when her place of employment had closed operations on the 19th of December, 2014. She stated that she was diagnosed with tuberculosis and was put on medication, and was finally discharged on the 5th of January, 2015.
- 4.1.2 According to the Applicant she remained at home, and went back to the hospital to ask for a sick sheet on the 12th of January, 2015. She testified that since she had still had not returned to full health, the doctor gave her some days off from work for three weeks (starting from the 12th of January 2015 going forward). The Applicant stated that when her three weeks sick leave elapsed, she sent her Aunt, one Vuyisile Simelane to her place of work to report that she was unwell, as well as to submit the sick sheet.
- 4.1.3 The Applicant testified that her aunt told her upon her return that there was no longer a job for her at the Respondent company(sebangicishile). She stated

that she was told by her aunt that her employers had said she should keep the sick sheet, and approach the company to re-apply for a new placement with the company. The Applicant stated that she had waited an extra week before going back to the Respondent's premises. She stated that she had spoken to the Human Resources Manager, Ms Nxumalo who had advised her that she had been removed from the company's list of employees on account of absenteeism on her part, but was advised that she could start the re-employment process by waiting at the gate together with other hopeful applicants, and if she was lucky she could possibly be hired. The Applicant stated that she had refused to leave on that day and had asked to see the Managing Director of the Respondent's company.

4.1.4 She stated that she was eventually interviewed at the behest of the Managing Director, and was told to remain at home until she was well enough to work. The Applicant stated that she indeed remained at home until the 16th of March, 2015, and on this day she went back to the Respondent's premises, and again spoke to Ms Nxumalo and the Managing Director and showed them the same sick sheet which she had earlier obtained. The Applicant testified that the Human Resources Manager, Ms Nxumalo later informed her on this day that the Managing Director was not happy with her "file" and informed her that she no longer had a job with the Respondent's company.

4.1.5 The Applicant further handed in as part of her evidence the said sick sheet dated 27th January, 2015 which reflected that she had been attended to on the 12th of January, 2015 and was due for a review on the 19th of January, 2015. According to the Applicant she had written a letter of appeal which was also handed in as part of her evidence. The letter was dated 16th March, 2015. She also made the Respondent's response to her letter of appeal dated 20th March, 2015. The Applicant lamented that although the employer had expected her back at work on the 12th of January, 2015, she had been unable to go to work since she was sick. She stated that she deemed it unreasonable for the employer to terminate her services since she had endeavoured to send her

aunt to the work place to report her illness, and she had also telephoned the workplace and had spoken to a certain lady, who's name she had not asked for. The Applicant stated that the said lady had answered the landline, and had informed her that she would relay the message about her illness to their superiors.

4.1.6 During cross-examination the Applicant acknowledged that she is well aware of the Respondent's policy that all employees had to ask for leave, or permission to go to hospital if they felt unwell, or else they could send someone to report the fact of their illness to the employer. The Respondent's representative also put it to the Applicant that she was well aware of the importance of reporting to the employer that she was unable to be at work because of illness. The Applicant acknowledged that this was the case, and recalled that she had previously received a final written warning for being absent without leave, and on another occasion she had been asked to write a formal letter wherein she had made an undertaking to refrain from simply disappearing from work without first seeking permission to be away from work.

4.1.7 The Respondent's representative asked the Applicant who she had spoken to when she allegedly made the telephone to the Respondent's company? The Applicant stated that she had forgotten to enquire who she was speaking to. It was put to her that she was not being truthful because she knew of the gravity of failing to report her absence to her employer, so she could not have easily forgotten to find out to whom she was speaking on the phone. The Applicant insisted that she had indeed called, and further stated that she had been staying at her parental home in Hlathikhulu with her elderly grandmother, and her young child, hence she had not been able to send anyone to go and report to the employer about her illness. She stated that she had been too ill to even go to the place of employment herself because she had been diagnosed with tuberculosis.

4.1.8 The Respondent's representative put it to the Applicant that she had endeavoured without success to telephone her so as to find out why she was not reporting for work on a number of occasions after she failed to come back when the company re-opened on the 12th of January, 2015. The Applicant disputed this, and maintained that the Respondent did not have her telephone number. The Applicant was referred to her employment forms, and finally acknowledged that she had filled in the said forms and had provided the contact number reflected in the form. She stated that the telephone number (25176495) she provided was her landline, and this number was no longer functional. It was put to her that it was her responsibility to ensure that she provided her employer with a contact number where she could be reached at all times. It was also put to her that the contact people provided on the form had also been provided by her. The Applicant conceded that indeed she had provided the information, and also conceded that the contact person (Lungisile Faith Mhlanga) could also not be reached because she had shared the same contact number as herself therefore the Respondent could also not reach her on the given number as it had been disconnected by the service provider. The Respondent's representative put it to the Applicant that the Respondent could therefore not be faulted for using the information she had provided in her employment forms and failing to reach her. The Applicant agreed that this was true.

4.1.9 It was put to the Applicant that she was also summoned to a disciplinary hearing through a notice which was slipped under her door at her residence on the 17th of January, 2015. The Applicant insisted that she had not received such a notification because she had been at her parental home in Hlathikhulu during this period. It was also put to her that she had been dismissed at a hearing that was held in her absence for absenting herself from work, and failing to report the reasons for this to the employer in terms of Section 36 (f) of the Employment Act, 1980 (as amended). The Applicant insisted that she did not even find any documents under her door when she eventually returned. She stated that she even doubted that this had happened at all.

4.1.10 The Respondent's representative further put it to the Applicant that she had not received any of the messages which she allegedly left when she sent her aunt, and when she telephoned the Respondent's reception. The Applicant conceded that indeed her job had been at stake, but she had believed that the messages had reached their intended destinations. She conceded though that she did not recall when precisely she had made the call. The Respondent's representative put it to the Applicant that she had failed to act responsibly by failing to note the dates, and to ensure that indeed her messages reached the office of the Human Resources Manager because she was aware that her job was on the line.

4.1.11 The Respondent's representative asked the Applicant if she was aware that in as far as the Employment Act was concerned, the legal position was that she had terminated her own contract of employment by failing to report for work, without reporting anything to her employer for a period in excess of three (3) days? The Applicant stated that this law had not been related to her when she was initially employed. She acknowledged that indeed she had first resurfaced at the workplace on the 9th of February, 2015 where she had been found to be too weak to perform the duties of pressing so she was not re-hired. She acknowledged, when it was put to her that the test form that she was shown was indeed that which pertained to her (dated 9/02/15) and that this was the first time she went to the place of employment since she left in December, 2014 when the company closed for the Christmas holidays.

4.1.12 She was further asked to explain why the dates on the sicksheet did not tally with the evidence that she had adduced in her testimony. She admitted that indeed she had sought medical attention on the 12th of January, 2015, and had been due for a review on the 19th of January, 2015. According to her the date of the hospital stamp was indeed the 27th of January, 2015 because that is when she sought to acquire a sick sheet which she could produce to her

employer. She stated that her illness had intensified on or about the 29th of December, 2014. She also acknowledged that the last incident she had at work that related to absenting herself from work without leave had occurred on the 9th of October, 2014. She stated that she had previously received a number of written warnings, and again in October, 2014 when she was asked by the employer to write a formal letter wherein she undertook not to do this again.

4.1.13 During re-examination, the Applicant stated that upon reflection, she recalled that the attempt to call the employer had been made by herself on the 12th of January, 2015. She stated that she recalled that the Receptionist had transferred her call to her Human Resources department. She also stated that she also recalled that she had sent her aunt to the workplace on the 26th of January, 2015. She stated that she had therefore only been absent without leave for about three weeks. She also explained that the sick sheet had only been stamped on the 27th of January, 2015 and that she had shown this sick sheet to her employer on the 9th of February, 2015.

4.1.14 **THE TESTIMONY OF MS VUYISILE SIMELANE**

4.1.15 The witness testified under oath that she is the Applicant's aunt as she is married to the Applicant's maternal uncle. She testified that she had been asked by the Applicant on the 26th of January, 2015 to take her sick sheet to her place of employment and to report that she was still too unwell to go to work. She stated that she had taken note of the date because she had just returned from Johannesburg on the 24th of January, 2015.

4.1.16 The witness stated that when she reached the Applicant's place of employment she spoke to the people she had found at the reception area (3 ladies). She stated that one of the ladies informed her that the Applicant had actually been removed from the list of employees. She stated that the lady in question had informed her of this after perusing a certain note book. She stated that she had also seen a certain Menzi Magwaza at the Respondent's

premises, and he is from her home area. The witness stated that she was told that the Applicant should retain the sick sheet, and then try her luck later to see if she could be re-hired.

4.1.17 The witness stated that she did not ask for the name of the lady she spoke to, but she knew that she had been stationed at the Human Resources Department because she had been directed there by the Receptionist. She stated that it was this lady who told her that the Applicant's name had been cancelled from the list of employees.

4.1.18 During cross –examination the witness conceded that she had not spoken to Ms. Nxumalo at the Human Resources Department, but maintained that she had indeed seen somebody at the said department. It was put to her that the Human Resources Department of the Respondent did not keep a notebook of the nature she was referring to. The witness stated that all she knew was that the person she spoke to had looked through a note book and had told her to tell her niece to re-apply for her job because she had been cancelled from the list of employees contained therein.

4.1.19 During re-examination the witness clarified that the said Menzi Magwaza had been sitting at the reception area with a gentleman who looked to be of Chinese descent, but stated that she was not aware of where he is employed.

4.2 **THE RESPONDENT'S CASE**

4.3 **THE TESTIMONY OF MS CALISILE SIBANDZE**

4.3.1 The witness testified under oath that she is currently employed by the Respondent as a Loader. She testified that she is aware that the Applicant, together with several other employees of the Respondent, failed to return to

work on the 12th of January, 2015 when the company re-opened after the holidays. She stated that since she had good relations with the people who work at the Human Resources Department she had been tasked with the delivery of several "letters" which she was to dispatch to the places of abode of the employees who were failing to report for work. She stated that one of the said letters was addressed to the Applicant, and she had enquired from other employees who told her where the Applicant resides.

4.3.2 The witness stated that she knows the Applicant, but was not close to her, hence the need to solicit the information of her exact physical address from other colleagues. She explained that she had proceeded to the Applicant's place of abode on the weekend, after having been given the "letters" on the previous day. She stated that she could no longer recall the precise dates, well, but recalled that this was the same week of the 12th of January, 2015 when they re-opened at work. She explained that when she got to the Applicant's house, she had knocked to no avail, and had ultimately slipped the "letter" under the door. She stated that she had then reported to the people at the Human Resources office that she had done this.

4.3.3 The witness was referred to a notice to attend a disciplinary hearing, addressed to the Applicant and confirmed that this is the document which she slipped under the Applicant's door. She further confirmed that she had been sent back to the Applicant's place of abode to deliver another letter which was a response to her letter of appeal against her dismissal (dated 20/03/15). She explained that she had proceeded to the same address where she had delivered the notice to attend the disciplinary hearing, but on this occasion she found the Applicant at home, and had proceeded to serve her with the letter in person.

4.3.4 During cross-examination the witness confirmed that the document she had slipped under the Applicant's door was dated the 16th of January, 2015. She maintained that she had delivered the letter the following day (Saturday 17/01/15). The Applicant's representative put it to the witness that her entire

testimony was not true because Saturday had not been the 16th of January, 2015 but actually the 17th of January, 2015. The witness maintained that all she recalled was that she had been issued with the document on the Friday, and had delivered it the next day.

4.3.5 During re-examination, the witness confirmed that she had delivered the Notice to Appear at the disciplinary hearing to the very same house where she later found the Applicant when she went to deliver the letter in response to her appeal against the dismissal. She confirmed that when she delivered this letter she had found the Applicant at her home in Ndlunganye, Matsapha. She confirmed that she had no ill-feelings towards the Applicant, and had derived no benefits from testifying in support of the Respondent's case at the arbitration proceedings. She stated that she still holds the same position of Loader that she had held even at the time when she was asked to deliver the documents to the Applicant's place of abode.

5 ANALYSIS OF EVIDENCE

5.1.1 The matter at hand requires a determination on the issue of the alleged unfair dismissal of the Applicant. She alleges that her dismissal was substantively and procedurally unfair. The Respondent on the other hand averred that the Applicant's dismissal was fair because she had absented herself from work, and had failed to report for duty as from the 12th of January, 2015 and only reported for work on the 9th of February, 2015. The Respondent's case is that by this time, the Applicant's position had already been filled.

5.1.2 From the evidence of the Applicant she sought medical attention for her illness during the period when the company was closed for the holidays because her illness had intensified on or about the 29th of December, 2014. She stated that although her sick-sheet was only stamped on the 27th of January, 2015, she had been treated on the 12th of January, 2015 and had been seen again on the 17th of January, 2015. By her own admission, she had been previously warned

on a number of occasions that she should not just disappear from work without alerting her employer of her whereabouts, and the reason for failing to report for work. She also testified that her last transgression had been in the month of October, 2014 where she personally wrote to the employer, duly undertaking never to repeat this unbecoming behavior. The Applicant, by her own admission, was well acquainted with the company's policy towards being away from work, and that she was expected to inform the employer either herself, or by sending someone else to report her illness to the employer.

5.1.3 The Applicant stated that she did telephone the Respondent's company during the period around the 12th of January, 2015, but was unclear on the exact date. She was not sure if her message reached the Human Resources Department. However, it was put to her that this had not occurred. From the evidence of the Applicant's own witness, (Ms. Ndzinisa) she had attempted to report the Applicant's illness on the 26th of January, 2015. This proved to be quite interesting because, this conflicts directly with the Applicant's own testimony that she had only managed to get the sick sheet on the 27th of January, 2015 as can be seen from the stamp on the said sick sheet. It can therefore not be true that Ms. Ndzinisa went to the Respondent's premises to deliver the sick sheet even before the Applicant obtained the sick sheet from the hospital.

5.1.4 The Applicant by failing to be vigilant about ensuring that her employer knew of her illness, and inability to report for work, whereas she knew that she already had a very bad record with the employer in light of her previous transgressions of a very similar nature worked to her own disadvantage. The employer cannot be faulted for coming to the conclusion that she had terminated her own employment contract. This conclusion finds support in the law. According to the Court in ***Alpheous Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (I.C. Case No. 382/04) at pages 9-10, paragraph 24;***

"Absenteeism differs from absconding or, as it is more often described, desertion from work. Absenteeism is merely an unexplained and unauthorized absence with the intention never to return. Both absenteeism and desertion are breaches of the contract of employment, but desertion is a repudiation of the contract. In other words, the employee's desertion manifests his intention no longer to be bound by his contract of employment. This repudiation does not by itself bring the employment to an end. The employer had an election to accept the repudiation and to bring the contract to an end, or hold the employee to the contract".

5.1.5 The law in Section 36 (f) of the Employment Act, 1980 (as amended) is also clear in that it states clearly that where the employee absents himself from work for more than a total of three (3) working days within a thirty (30) day period without official leave, or a medical certificate, this is a valid reason for dismissal. This law applies even to the Applicant in casu even though she lamented that she was not told of the law when she was initially employed. It is a trite legal position that ignorance of the law is no excuse.

5.1.6 The Applicant showed a deliberate and unequivocal intention no longer to be bound by her employment contract by making it even very difficult for the employer to contact her when she disappeared from work. She indeed proved quite elusive because she was difficult to contact despite the employer's efforts to telephone her, or the contact person that she provided to the employer. She failed to keep the employer informed of how she could be reached if not on the number which she herself provided to the employer.

5.1.7 It was quite admirable that the employer even sought to invite her to a disciplinary hearing to face the charge of desertion since the law actually absolves the employer from this obligation in the given circumstances. The court in the ***Alpheous Thobela Dlamini case (supra) at page 11 paragraph 27*** categorically states that:-

".....there is no need for an employer to hold an enquiry. It may simply accept the employee's desertion as a repudiation of the employment contract, and thereby terminate the contract".

5.1.8 This having been said, it is clear that it is immaterial whether or not the Applicant received the notice to attend the hearing because when she finally resurfaced at the workplace on or about the 9th of February, 2015, her employment contract had effectively been terminated by her own hand.

6 AWARD

6.1 Having heard the evidence of both parties, I hereby find that the termination of the Applicant's services was substantively and procedurally fair. The Applicant's claims are hereby dismissed in their entirety.

THUS DONE AND SIGNED AT MANZINION THISDAY OF JULY, 2016.

**KHONTAPHI MANZINI
CMAC ARBITRATOR**