



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 184/2012**

In the matter between:

**DULCIE NDZIMANDZE**

Applicant

and

**GLENRAND M.I.B. SWAZILAND (PTY) LTD**

Respondent

**Neutral citation:** *Dulcie Ndzimandze v Glenrand M.I.B.(284/2012) SZIC 40*  
(May 25 , 2018)

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

**Heard submissions:** 25/04/18

**Delivered judgement:** 25/0518

**SUMMARY---Labour Law---Employee absenting herself from work for a period of more than three working days in a period of thirty days---Employee arguing that she was unfit for work and producing a Clinic attendance document signed by a nurse practitioner---Whether such document qualifies as a certificate signed by a medical practitioner---Provisions of the Medical and Dental Practitioners Act.**

**Held---In terms of the Employment Act a certificate must be signed by a medical practitioner certifying that an employee was unfit for work for a period of more than three working days in any period of thirty days.**

**Held further---In terms of the Medical and Dental Practitioners Act a medical practitioner is a doctor or a dentist.**

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## **JUDGEMENT**

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1. The Applicant in this application was first employed by the Respondent on 01<sup>st</sup> June 2000 as a Receptionist. She was in continuous employment until she was dismissed by the Respondent on 18<sup>th</sup> January 2012.
2. At the time of her dismissal, the Applicant had moved up the employment ladder and she was working in the workmen's

compensation claims and underwriting department of the Respondent. The Respondent is a company that is involved in the insurance industry.

3. The Applicant was dismissed after she was found guilty of absenteeism by a disciplinary hearing tribunal convened by the Respondent. The Applicant did not accept the dismissal and she duly filed a dispute with the Conciliation, Mediation and Arbitration Commission (“CMAC”). The dispute could not be resolved by conciliation and the Commission issued a certificate of unresolved dispute.
4. In her statement of claim the Applicant stated that her dismissal by the Respondent was substantively and procedurally unfair because;
  - 4.1 *The Chairman failed to advise her of her rights despite the fact that the prosecutor and the chairman were admitted attorneys.*
  - 4.2 *The Chairman did not give the Applicant the opportunity to state her side of the story but allowed only the initiator to lead his witness.*
  - 4.3 *The Applicant was not given the opportunity to cross examine the Respondent’s witness.*

- 4.4 *The Applicant did not commit any offence that warranted dismissal as it was the practice at the Respondent's place to fill the relevant leave forms when one returned to work.*
- 4.5 *The Chairman failed to consider the sick note submitted by the Applicant.*
- 4.6 *The Respondent's General Manager was aware of the reasons behind the Applicant's absence.*
- 4.7 *The Applicant was not afforded the opportunity to be heard on appeal despite the fact that she filed her appeal against the decision to dismiss her.*
5. In its Reply, the Respondent denied that the dismissal of the Applicant was unfair. The Respondent stated that the dismissal of the Applicant was both substantively and procedurally fair on account of the fact that she was dismissed due to her own misconduct.
6. The evidence led before the Court by the Applicant revealed that at the time of her dismissal she was employed by the Respondent in the workmen's compensation claims and underwriting department. Her immediate supervisor was RW1, Doctor Bongani Mhlanga. On Monday 17<sup>th</sup> October 2011, her father-in-law who was sick, suddenly became worse. She therefore telephoned the receptionist Bagezile Tfwala that she was going to arrive late at work because she had to attend to her father-in-law.

7. The Applicant's father-in-law unfortunately passed on and she again telephoned the receptionist to say that she would not be reporting for duty on that day. The Applicant told the Court that she had to attend to the mortuary and come back home to attend to people who came to mourn the passing on of her father-in-law. The Applicant did not report for duty during that whole week as she said she had to prepare for the funeral that was to take place on that weekend.
8. On the following Monday, 24<sup>th</sup> October 2011, the Applicant was not feeling well, due to the hectic events leading to the funeral. She therefore went to Siphiso Clinic where she was attended to and was given five days off duty in order to rest as the nurse who attended her found that she was stressed. That whole week therefore the Applicant did not report for duty. The sick note is Annexure "A9" of the Applicant's Bundle of Documents. It was signed by a Clinician by the name of Caslina Dlamini.
9. The Applicant's condition did not improve. Again on the following Monday, 31<sup>st</sup> October 2011, she went to Mkhaya Clinic where she was given one week off duty and to resume duty on Monday 07<sup>th</sup> November 2011. The sick note was signed by Doctor J.Z. Gama and it is Annexure "A10" of the Applicant's Bundle of Documents. When the Applicant finally resumed duty on 07<sup>th</sup> November 2011, she went to talk with her immediate supervisor, RW1. The Applicant said she filled the leave form on that day and continued with her duties. On 02<sup>nd</sup> December 2011, the Applicant was called by her immediate supervisor who served her with a notice to attend a disciplinary

hearing on 08<sup>th</sup> December 2011. The Applicant was charged with absenteeism, it being alleged that she absented herself from duty without the employer's permission or a valid reason and without producing a valid note from a medical practitioner between 17<sup>th</sup> October 2011 up to 04<sup>th</sup> November 2011.

10. The Applicant pleaded guilty to the charge. She was indeed found guilty and dismissed by letter dated 17<sup>th</sup> January 2012, Annexure A3 of the Applicant's Bundle of Documents. The Applicant lodged an appeal. There was, however, no appeal hearing that was held by the Respondent. In Court the Applicant explained that when she pleaded guilty she was merely acknowledging that she was not at work on those days and not that she was admitting the charge.
11. During cross examination the Applicant told the Court that she was unable to get through to her immediate supervisor and that that was the reason that she asked the receptionist to pass the message to the employer. When it was put to her that the employer was only informed that she was not going to report for duty only on the 17<sup>th</sup> October 2011, the Applicant told the Court that it was a practice that if one was unable to report for duty, that person would report to the receptionist and would fill the leave application form later on resumption of duty.
12. The Applicant led two other witnesses before the Court in support of her case. AW2, Florence Gugu Simelane told the Court that she is a nurse by profession. She told the Court that she is employed by Sipiwo Clinic which is based at KaKhoza. She told the Court that

she is responsible for the day to day operation of the Clinic. She said the sick note that was issued to the Applicant was a usual document that was issued to patients. During cross examination AW2 told the Court that she was senior to Caslina Dlamini who signed the sick note. She told the Court that as a Nurse Practitioner she was entitled to sign the sick note. She told the Court that Calsina Dlamini is a Staff Nurse and Nurse Practitioner. AW2 told the Court that she was not on duty when the sick note was issued to the Applicant.

13. AW3, Caslina Dlamini told the Court that she is employed by Siphiso Clinic and that the owner of the clinic is AW2. She told the Court that it was her who attended to the Applicant on 24<sup>th</sup> October 2011 and issued her with the sick note. Under cross examination she told the Court that she holds the same qualifications as AW2.
14. The Respondent led only one witness, RW1, Doctor Bongani Mhlanga. RW1 told the Court that he was the General Manager of the Respondent at the time of the Applicant's dismissal. He was the immediate supervisor of the Applicant. RW1 told the Court that on 17<sup>th</sup> October 2011 he got a report that the Applicant was not going to report for duty because her father in law had passed away. RW1 said the Applicant however did not report for duty for the rest of that week. He said the Applicant also did not report for duty on the week that followed, that is, Monday 24<sup>th</sup> October 2011. He told the Court that on that day, Applicant's doctor called to report that she was not going to be at work. RW1 said on 27<sup>th</sup> October 2011 he found a sick note on his desk saying that the Applicant was going to be off duty for five

days. He said the Applicant was expected to report for duty on Monday 31<sup>st</sup> October 2011. On that day the Applicant did not report for duty. On Thursday 03<sup>rd</sup> November 2011, RW1 made enquiries about the whereabouts of the Applicant from his secretary. After lunch on that day at 2:00 P.M when he returned to his office, he found the sick note from Mkhaya Clinic.

15. When the Applicant finally returned to work, RW1 then charged her for absenteeism. RW1 said the Applicant violated the leave policy of the Respondent. RW1 told the Court that the Applicant was not so incapacitated as not to be unable to come to the office to sign the leave form. He told the Court that Mkhaya Clinic where the Applicant got the last sick note is situated near the Respondent's place of work. RW1 told the Court that the Applicant was working for a critical area at the Respondent's place. RW1 told the Court that he did not recognize the sick note from Siphiso Clinic because it was not signed by a doctor. He said the Respondent's policies provided that the sick note should be signed by a doctor.
16. RW1 told the Court that when the Applicant returned to work on 07<sup>th</sup> November 2011, she came to see him in his office to apologize. He said he directed her to the leave policy. He said the Applicant went away and returned to him on 09<sup>th</sup> November 2011 to pursue the matter of her absence. He told the Court that the Applicant was charged with absenteeism and was found guilty and dismissed with notice.

17. During cross examination RW1 agreed that the Applicant's letter of dismissal was signed in Johannesburg. RW1 agreed that on 17<sup>th</sup> October 2011, the receptionist, Bagezile Tfwala, did report to him that the Applicant was not going to report for duty on that day. He told the Court that the Applicant's first sick note was not signed by a doctor. RW1 further told the Court that the leave policy was known by all the employees. He told the Court that the document was not signed by the parties because it was available in soft copy and was accessible through the intranet at the workplace.

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

The Applicant appeared before a disciplinary hearing panel on 08<sup>th</sup> December 2011. The chairperson was Mr. N. Mzizi, a senior attorney based in Manzini. The initiator was Mr. S. Zikalala, also an attorney of the Courts of Eswatini. The Applicant was not represented. She told the Court that she did not ask any of her colleagues to represent her for fear of victimization. The chairperson did not give the Applicant an opportunity to get outside representation or legal representation. It was clearly irregular on the part of the chairperson not to give the Applicant the opportunity to seek legal representation taking into account the fact that the chairperson himself was a legal practitioner and that the Respondent was represented by a legal practitioner. There was therefore no equality of arms. The dismissal of the Applicant was therefore procedurally unfair. (*See:- Sebenzile*

*Zikalala V Baylor College of Medicine Children's Foundation Swaziland, case number 154/2012 (I.C).*

19. The record of the disciplinary hearing was filed in Court. The record showed that after RW1 had presented his evidence, the chairman invited the initiator to lead aggravating circumstances. The initiator advised the chairman that he would not submit any aggravating factors. Thereafter, the chairman called upon the Applicant to cross examine RW1. It seems from the record that the Applicant was thereafter invited to make submissions on mitigating factors. The chairman, using his discretion called the receptionist, Bagezile Tfwala to testify. Bagezile Tfwala testified and she denied that the Applicant advised her that she was not going to report for duty because she had to undergo the customary practice called 'kufukama'. There is no indication on the record that the Applicant was given the opportunity to cross examine Bagezile. This was again another clear misdirection by the chairman which rendered the dismissal to be procedurally unfair.
20. There was also no evidence from the record of the disciplinary hearing that the Applicant was given the opportunity to state her defence. The record only reflects that *'after the initiator's case the chairman gave the Accused an opportunity to submit mitigating factors'*.
21. The evidence before the Court also revealed that the Applicant was given five working days within which to appeal. The Applicant was

served with the letter of dismissal on 18<sup>th</sup> January 2012. She indeed filed her appeal on 24<sup>th</sup> January 2012. It was not disputed that the appeal was filed within the period stated by the Respondent. The Respondent did not however hold the appeal hearing. Instead the Respondent wrote a letter to the Applicant dated 16<sup>th</sup> March 2012 asking the Applicant to write a formal letter whether she would have any objection if one of the Respondent's directors, Mr. Musa Sibandze were to chair the appeal hearing. There was no evidence that the Applicant received this letter. It was never put to the Applicant during cross examination that she received this letter.

22. The Applicant having already filed the appeal, it is highly unlikely that she could not have responded to the letter if she had received it. She had already made clear her intention to be heard on appeal. Taking into account all this evidence, the Court will come to the conclusion that the Applicant never received the letter and she was not therefore the cause of the none hearing of the appeal. In any event, when the chairman of the disciplinary hearing was appointed, the Applicant was not first consulted. There was no explanation by the Respondent why this time it wanted to get the consent of the Applicant first before it can hold the appeal hearing. The Applicant desired to exercise her right to be heard on appeal. That opportunity was not availed. For this reason again, the Applicant's dismissal was procedurally unfair.
23. The evidence revealed that the Applicant did not produce a certificate signed by a medical practitioner certifying that she was unfit for work

on Monday 17<sup>th</sup> October 2011 and for that whole week. The Applicant also did not report for duty on the following week starting from Monday 24<sup>th</sup> October 2011. For that week however, the Applicant did produce a sick note from Siphwo Clinic. The Respondent did not recognize that document because it was not signed by a medical practitioner as required by the law.

24. The Applicant again did not report for duty on the following week. For her absence on those days she produced a sick note from Mkhaya Clinic which was signed by a medical doctor, Doctor J.Z. Gama. The Respondent did not have any issue with that document.
25. The questions for the Court to decide is whether the Applicant unlawfully absented herself from work during the first week because she did not have the employer's permission; secondly, whether her absence during the second week was unlawful because she did not have the employers permission or a medical practitioner's certificate certifying that she was unfit for work.
26. The evidence revealed that on Monday 17<sup>th</sup> October 2011, the Applicant did make a telephone call to the receptionist, Bagezile Tfwala to report that she was not going to report for duty on that day. The receptionist did relay that message to the Applicant's immediate supervisor, RW1, Doctor Bongani Mhlanga. Mr. Mhlanga confirmed this in his evidence before the Court. Mr. Mhlanga however denied that he also got a message on the second day informing the employer that the Applicant was not going to report for duty that whole week.

27. Clearly, the immediate supervisor having received the message that the Applicant was not going to be at work on that Monday, and the immediate supervisor having not responded and informed the Applicant that her reasons were not acceptable to the employer and that she should report to work immediately, fairness and equity require that her absence on that day should not be regarded as being unlawful for the simple reason that she did not follow the requirements of the leave policy. For the other days however, Mr. Mhlanga told the Court that he did not get any report that the Applicant was not going to be at work for the whole week. The evidentiary burden fell on the Applicant to rebut that evidence. The Applicant failed to call Bagezile Tfwala to testify before the Court and say that she did inform Mr. Mhlanga that the Applicant was not going to report for duty for that whole week.
28. Mr. Mhlanga was an honest and reliable witness. He did not hesitate to admit evidence that was not in favour of the Respondent's case. He admitted that he did get the message that the Applicant was not going to be at work on Monday 17<sup>th</sup> October 2011. He also admitted that the Applicant did lodge an appeal and that to his knowledge no appeal hearing was held.
29. The Applicant told the Court that she could not go to work to sign the leave forms because she was busy at home as she had to attend to the people who came to mourn the passing away of her deceased father-in-law. She also told the Court that it was a practice that one would fill

- the leave forms on his return to work. The Respondent did not dispute the Applicant's evidence that she was the main person responsible to attend to the mourners and also to make the funeral arrangements.
30. The Applicant was not sick during the first week of her absence. She was merely busy at home. The Court rejects the Applicant's explanation that she was so busy that she could no spare a moment to go to work and sign the leave forms. Taking into account all the evidence before the Court and also the Respondent's leave policy, the only reasonable conclusion that the Court can arrive at is that the Applicant did not go to sign the leave forms because she was aware that her father-in-law was not one of the people covered by the policy under 'family and responsibility leave.' Her absence on those days was therefore unlawful.
31. The Applicant also did not report for work on the following week. For that period she tendered a sick noted from Siphwo Clinic which was signed by a nurse. The Respondent argued that this was not a proper and acceptable document as it was not signed by a medical practitioner as envisaged by the law. Indeed, the **Employment Act No. 5 of 1980** as amended provides in Section 36(f) that it shall be fair for an employer to terminate the employee's services if 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."*

32. The enquiry that follows is; who is a medical practitioner as envisaged by the **Employment Act**. Medical practitioner is defined in Section 2 of the **Employment Act** as;

*“Medical practitioner” has the meaning ascribed thereto by the Medical and Dental Practitioners Act, 1970.”*

33. The **Medical and Dental Practitioners Act, 1970** defines a medical practitioner under Section 2 as;

*“Medical Practitioner” means a person practicing as a medical practitioner or holding himself out as ready and willing to practice as a medical practitioner for gain.”*

**The Nurses and Midwives Regulations, 1971** under Regulation 2 provides that;

*“doctor” means a medical practitioner duly registered as such under the Medical and Dental Practitioners Act, No. 3 of 1970.”*

34. The Oxford English dictionary defines a medical practitioner as a physician or surgeon. (See: The Concise Oxford Dictionary of Current English, 9<sup>th</sup> edition p.846).

35. The owner of Siphwo Clinic is AW2, Florence Gugu Simelane. She is not the one who signed the sick note, but it was signed by AW3,

Caslina Dlamini. The two are nurses by profession. AW3 told the Court that she is employed by AW2 as a relief nurse when AW2 is not on duty. There was no issue raised about AW2 operating a private clinic. In fact the law allows her to do so in terms of the **Nurses and Midwives Regulations of 1971**. Regulation 15 deals with conducting of private clinic by a nurse. Regulation 15(2) provides that;

*“Any nurse desiring to establish and conduct a private clinic shall apply in writing to the Chief Medical Officer for written permission to do so.”*

Sub-regulation 3 provides that;

*“Such application shall be accompanied by the written undertaking of a doctor that he will directly supervise such clinic.”*

Sub-regulation 6 spells out the **jurisdiction** of the nurse practitioner and it provides that;

*“Save in case of emergency and the absence of a doctor the services of a nurse in charge of such clinic shall be confined to first aid, domiciliary midwifery, welfare clinics and public health education.”*

There was no evidence before the Court that the Applicant went to Siphiso Clinic because of an emergency. There was also no evidence that the Applicant went there because of first aid or midwifery related issues.

36. In terms of Part II of the **Medical and Dental Practitioners Act**, there is established a Medical and Dental Council and Registration of Practitioners. In terms of Section 13 (e) the Registrar of the Council shall cause to be published in the Gazette after the first day of January in each year a list of all medical practitioners and dentists. The latest Gazette was published on Wednesday 10<sup>th</sup> January 2018. The name of Caslina Dlamini does not appear in that list. The list consists of medical doctors and dentists.
37. When considering the list of the medical practitioners appearing in Gazette in terms of Section 13(e) of the **Medical and Dental Practitioners Act**, there is no doubt to the Court that medical practitioner in terms of the Act means a doctor or a dentist. The present sick note from Sipiwo Clinic is not therefore a *'certificate signed by a medical practitioner'* as required by Section 36(f) of the **Employment Act**.
38. The document from Sipiwo Clinic is clear on the face of it that it is not a certificate but an attendance note. It only proves that the Applicant did attend the Clinic on that day. It may well be that the Applicant was not feeling well on that day. However, whether or not she was so unwell as to be unfit for work for more than a total of three working days in any period of thirty days, was for a medical practitioner to say in terms of the **Employment Act**.

39. The Court will therefore come to the conclusion that the document from Siphwo Clinic is not “*a certificate signed by a medical practitioner*” as envisaged by the Employment Act. It should follow therefore that the dismissal of the Applicant was substantively fair.

40. **RELIEF:-**

The Applicant in her application had applied for re-instatement or alternatively payment of terminal benefits. The Court has come to the conclusion that the dismissal of the Applicant was unfair only because the employer did not follow a fair procedure. The Court is therefore enjoined to only consider compensation. **(See: Section 16 (2) (d) of the Industrial Relations Act).**

41. At the time of her dismissal the Applicant had served the Respondent for twelve years. She is now fifty two years old. She was employed in the financial industry. It is highly unlikely for her to get employment in this industry again. She is married and has three children, one of whom is still below twenty one years. Taking into account all these the Court will come to the conclusion that compensation equivalent to four months’ pay will be fair.

42. Taking into account the personal circumstances of the Applicant, the interests of justice and fairness, the Court will make the following order:

- a) *The Respondent is to pay to the Applicant the sum of (E8,100x4) E32, 400:00 as compensation for the procedurally unfair dismissal.*
- b) *There is no order as to costs.*

43. The members agree.

A handwritten signature in black ink, consisting of a circular mark containing the letters 'NN' followed by a stylized, flowing signature.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

*For Applicant* : *Mr. A. Lukhele*  
*(Attorney at Dunseith Attorneys)*

*For Respondent:* *Mr. B. Gamedze*  
*(Attorney at Musa M. Sibandze Attorneys)*