



**IN THE CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MBABANE

SWMB 155/09

In the matter between:-

MXOLISI MASUKU

APPLICANT

And

THEMBENI MAGONGO

RESPONDENT

CORAM:

Arbitrator

: Mr. A. Dlamini

For Applicant

: Mr. Mxolisi Masuku

For Respondent

: Ms Thembeni Magongo

ARBITRATION AWARD

DATE HELD : 10th September 2009

VENUE : CMAC OFFICES, MBABANE HOUSE

1. PARTIES AND HEARING

- 1.1 The Applicant in the matter is Mxolisi Masuku, an adult male of Esinceni, Manzini Region. I shall refer to the Applicant as Mr. Masuku, the employee or simply the Applicant.
- 1.2 The Applicant did not have any one to testify on his behalf. He stated that he would rely on the evidence and testimony of the Respondent's witnesses.
- 1.3 The Respondent in the matter is Thembeni Magongo, an adult female who hails from Elangeni next to Lobamba. She is the daughter of the late chief and as such she is the Inkhosatana who had assumed the powers of her father as she was acting in that capacity.
- 1.4 I shall refer to the Respondent as the employer, the Respondent, the Inkhosatana as and when the circumstances dictate. Both parties appeared in their own personal capacity.
- 1.5 The Respondent was assisted by at least four witnesses.

2. BACK GROUND INFORMATION AND THE OVERVIEW OF THE CASE

- 2.1 The Applicant was previously employed by A.G. Thomas, a construction company which constructed the Ngwenya - Manzini High way. Before the completion of the road construction, the Applicant had identified a piece of land where he could set up a small business of washing cars.

- 2.2 On or about November 2006, the Applicant set himself the mission to achieve his dream by approaching the royal kraal of Elangeni (umphakatsi) with the intention to apply for the area he had identified.
- 2.3 It is his submission that he found the Inkhosatana at the umphakatsi and further introduced himself and his mission. He submitted that the Respondent welcomed him very kindly stating that what he was looking for made a lot of sense as he wanted to help himself instead of getting involved in criminal activities in order to get money.
- 2.4 The Respondent according to the Applicant said what he was looking for was easy as she thought he wanted to acquire land through khonta system to establish a homestead. The Respondent went on to tell him that the Libandla (council) was still with the King as it was during the Incwala ceremony. As evidence of the fact that it was the Incwala period, the Respondent showed him the Royal Water People known as “Bemanti”.
- 2.5 According to the Applicant the Respondent went on to say that if the Applicant was lucky it was possible for the Indvuna to show up that day for the purpose of “vusela” to the Royal Kraal.
- 2.6 It was not very long that Babe Msibi (Msunduza) and Babe Madelesi Joseph Tsabedze appeared and stood a little

distance from where they were standing seeing that the Inkhosatana was still busy with the Applicant.

- 2.7 It is the Applicant's version that the Respondent suggested to him that because there was now a tentative agreement between the two, could the Applicant assist her in the weeding of the royal fields and he should put a price for the area he would have finished.
- 2.8 According to the Applicant he agreed to assist and further informed the Respondent that he would come on Monday the following week. On his resumption of this piece of job of weeding, the Applicant submitted that a certain Mrs. Mndzebele Lomcebo allocated to him the field he would weed on his own as he could not join the rest of the warriors because, he was coming later than they had started. Mrs. Mndzebele was one of the second - in - charge.
- 2.9 It is the Applicant's case that on completion of his tasks duly assisted by the Libutfo on a Saturday, he reported to the Respondent. The Respondent did not ask him how much he wanted but instead she paid him E150.00. He was further offered the mahewu and when he was readying himself to go, the Respondent told him to sit and wait for her as she wanted to speak to him. He obliged.
- 2.10 According to the Applicant, the Respondent then asked him to assist her in looking after the herd of cattle informing him that she had had numerous problems because of the cattle damaging the people's fields every season. It is the Applicant's submission that he was first reluctant because

his intention was to get the place for his car wash in order to see his dream come true. He was tired of being employed by people and companies for a monthly wage.

2.11 It is the version of the Applicant that the Respondent appealed to him for assistance which was going to be for a short space of time until she found someone else. Further, it is the Applicant's case that whilst in the middle of the discussions with the Inkhosatana. Mr. Msibi and Mr. Tsabedze joined them. The Applicant was duly introduced to the two by the Respondent. The Respondent went on to inform them that she had found someone who was going to assist her in looking after the herd of cattle as a herdsman.

2.12 The Respondent, the manner in which she introduced the Applicant, it was as if she had been away to look for someone like him. According to the Applicant the Respondent realized that her facial reception was not in agreement with what she was saying to the two men.

2.13 In view of this disapproval facial expressions, the Respondent then informed the men that I had come for a specific request to be granted permission on the identified piece of land to establish a car wash.

2.14 The Applicant stated that he was welcomed by the two elders who further advised him against the idea of living in Matsapha where he had a rented flat. According to the Applicant he then went to Matsapha to collect his belongings as he was offered a room within the royal kraal.

- 2.15 The Applicant went on to state that he took over the responsibility to look after the cattle from 2006 to 2007 earning E250.00 per month. In October 2007, the Applicant submitted that he approached the Respondent to review the wage as it was too small. In November 2007 his salary was increased from E250.00 per month to E450.00 per month.
- 2.16 The Applicant submitted that he worked all Saturdays, Sundays and public holidays without being paid. He stated that the work was such that he could not even attend funerals for his relatives.
- 2.17 On or about the 20th November 2008 when the Respondent sent the Indvuna to tell him that he should take out his belongings from the room allocated to him to elsewhere as there were water people coming. It is the Applicant's version that at the same time there was a motor vehicle from the defence force to ferry him away. When he asked whether he was being dismissed, the Respondent replied that "it was nice to meet but sad to part ways". According to the Applicant the motor vehicle transported him up to a Ngwenya homestead.
- 2.18 It is the Applicant's version that he then decided to write a letter to the Respondent to try and reason with her, inquiring whether he had been dismissed and if so what his offence was but in vain. He submitted that he wrote two letters but there was no response by the Respondent.

- 2.19 According to the Applicant, he was never brought before a disciplinary hearing nor was he told of his offences. He further lost the opportunity to establish his car wash which was his dream business and at the time of this hearing he was still not employed as finding another job just became difficult for him.
- 2.20 It was his view that the termination of his services was both procedurally and substantively unfair. He prayed that he be paid all his terminal benefits, the underpayments and compensation for unfair dismissal.
- 2.21 The version of the Respondent was almost similar to that of the Applicant, except in certain areas where they differed. According to the Respondent the Applicant started in December not in November 2006.
- 2.22 The Respondent denied that she had promised the Applicant any piece of land to establish his car wash. She stated that this could have been impossible because at the time there was no Libandla available to discuss such matters.
- 2.23 The Respondent admitted that she accepted the Applicant after he had requested for a job. She stated that she advised the Applicant that there was no job available but that it was the weeding season and if he wanted to make some money he was free to participate in weeding and should state his costs which he did and was paid accordingly.

2.24 She further confirmed that the fields were weeded by the warriors (Libutfo). According to the Respondent when the weeding was completed the Applicant requested to become a herdsman and or the royal kraal messenger residing within the umphakatsi.

2.25 It is the Respondent's version that although she had told the Applicant that there was no job she agreed that he could continue staying within the royal kraal while he was looking for a job.

2.26 The Respondent continued to state that as the years went past the Applicant's conduct and behaviour changed becoming more disrespectful, insulting and abusive towards the small herdboys and as well as towards her. This did not end there but went on to insult people who would come to assist in the royal kraal. In fact he had become a nuisance of himself especially when taken one too many. In short the Applicant had just become a lawless person.

2.27 The Respondent went on to enlist the offences allegedly committed by the Applicant which included among others.

- Failing to properly look after the cattle until they were impounded by the pound master in Mbabane.
- His negligence towards the cattle leading to one of them being knocked down by a car on the Mbabane/Manzini Highway

- Demanding to collect the beast's head in order to eat the tongue yet he had refused to collect the beast from the place where it was knocked down by a car.
- In November 2008 being a Friday, the Applicant is alleged to have refused to ensure that the cattle were brought into the kraal.
- In September 2008 it is alleged that he insulted the Respondent and further refused to take lawful and legitimate instructions

2.28 The Applicant's behaviour and his unruliness was reported to the Induna of the royal kraal whose efforts yielded no positive results.

2.29 According to the Respondent it was again that time of the year when she was expecting the "sea water boys" who would normally be lodged in the royal residence in the house where the Applicant lived. The Respondent requested the Applicant to vacate the house to give way for the sea water boys but the Applicant refused to oblige arguing that whoever wanted to move him out and should find him an alternative house.

2.30 It is the Respondent's version that it became clear that keeping the Applicant within the royal kraal was no longer safe and of no purpose. He was arrogant, aggressive and very abusive to the people who lived within the Umphakatsi including the Respondent. In short the relationship deteriorated considerably such that the Applicant was undermining the authority of the Inkhosatana, a situation

which was no longer tenable; hence the decision to dismiss him was taken.

2.1 It is the Respondent's case that she had no alternative but to terminate the contract of employment between herself and the Applicant. She stated that even his brother refused to associate himself with him arguing that the Applicant was extremely unruly. According to the Respondent the motor vehicle mentioned by the Applicant was not the soldier's motor vehicle but simply one that was asked to offer him a lift to another homestead where he could get accommodation. The Respondent went on to state that she had suffered serious damages at the hands of the Applicant including the loss of various home tools.

2.2 The Respondent moved an application for a claim of traveling costs against the Applicant on grounds that the Applicant failed to appear on the 27th July 2009 at 9h00, as a consequence of which the arbitration proceedings were postponed. Her basis for the claim was that the Commission ordered her to pay traveling costs for the Applicant while the matter was still at conciliation when she had to ask for a postponement.

3. ANALYSIS OF THE EVIDENCE

3.1 While the versions of the two parties may appear to be diverse in some instances, it became relatively clear that there were common cause facts which led to the termination of the employment relationship.

- 3.2 What had to be determined in this case is whether the Applicant was an employee to whom Section 35 of the Employment Act 1980 applied. Secondly, I must make a decision whether there was the employment relationship as the Respondent denied that the Applicant was employed by her. Thirdly, if there was an employment relationship, further decide whether the dismissal was fair or unfair. Finally, I would have to decide whether the Applicant is entitled to the prayers listed above.
- 3.3 From the evidence presented by both parties it became obviously clear that there existed a contract of employment between the Applicant and the Respondent. It is common cause that the Applicant arrived at the place of residence of the Respondent with the sole mission to be allocated a piece of land which he had identified as prime for establishing a car wash business. Both parties were in agreement that this mission could not be fulfilled at the time because the royal council (libandla) was still at the Ludzidzini performing the Incwala Ceremony.
- 3.4 It is not disputed that the Applicant and Respondent agreed to the idea that the Applicant should await the return of the royal kraal council with which to pursue his application for the piece of land.
- 3.5 It is not in dispute either that the parties agreed to the idea that in the meantime, the Applicant could assist in the weeding of the fields for a specific fee. On completion of the

weeding the parties discussed the issue of looking after the herd of cattle and although they did not agree on the quantum for a monthly wage it is clear from the evidence that there was an agreement. The Applicant on cross - examination by the Respondent on whether she ever employed him for the job of looking after the cattle, he remained firm stating that he was promised a monthly wage which was not stated but from then on as he executed these duties the Respondent paid him a monthly wage of E250.00. This evidence was not rebutted by the Respondent. She however argued that this amount was just for an allowance.

- 3.6 Accordingly the witnesses namely: Sibongile Maphanga nee Sibeko, Tenele Shabangu, Lomsombuluko Mndzebele and Msunduza Msibi, gave a corroborative evidence that the Applicant was employed to look after the umphakatsi cattle and that he was paid a wage on a monthly basis.
- 3.7 Two of the witnesses even stated how much the Applicant was paid per month. RW2, Sibongile Maphanga stated that the Applicant earned E250.00 per month while her son was paid E200.00 per month. RW3, Tenele Shabangu testified that the Applicant was given E450.00 per month. This evidence was never rebutted by the Respondent and as such it should be admitted as the truth. All the witnesses testified under oath and there is no reason for the arbitrator to doubt their testimony.

- 3.8 There is a need to define what an “employee” means in terms of our Employment Act 1980 as amended. The said act in Section 2 defines an “employee” as **“any person to whom wages are paid or are payable under a contract of employment”**. It further carries on to define the meaning of a **“wage” as remuneration or earnings including allowances, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment or for services rendered or to be rendered under such contract”**.
- 3.9 In furthering the above argument I shall as well refer to the case of **Virgilio Tai Mangwe vs. Joice Mmari - CMAC Case No. SWMB 270/08 page 10** where we observed the authority by John Grogan in his book **“workplace law; Eighth Edition 2004, page 31, paragraph 6, where it is stated “the essentials of “locatio conductio operarum” gives a definition of a contract of employment as an agreement between two legal persons (parties in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration and which entitles the employer to define the employee’s**

duties and control the manner in which the employee discharges them”.

3.10 In view of the definition and explanations stated above I have no doubt in my mind to answer the question whether the Applicant was an “employee” to whom Section 3 of the Employment Act applied or whether there was a contract of employment between the two parties, to the affirmative. The Applicant was an employee to whom Section 35 applied.

3.11 The next issue to determine is whether the Applicant’s dismissal was fair or otherwise. An employee’s termination of services can either be unfair in terms of the procedure followed before arriving at the element of guilt and the substance. This suggests that there must be a properly constituted tribunal. That the Applicant should know his or her charges before the hearing is conducted. That the accused person should be given enough time to prepare himself for the case. That in the event he wishes to be represented by someone such opportunity should be provided. That all his rights should be explained. In the case before me it is abundantly clear that this did not happen and there was no evidence from the Respondent testimony to suggest anything contrary. There was no disciplinary hearing conducted prior to arriving on the element of guilt let alone a sanction to dismiss.

3.12 On the other hand I have taken into account the type of contract of employment and circumstances surrounding

failure to follow the standard procedure. It is noted that this is a relationship between two individuals where the indulgence of various levels of management are non-existent. That though there were no written warnings against the Applicant, there were instead numerous verbal warnings. The evidence which was never rebutted that the Applicant's conduct was no longer acceptable, most of which related to poor work performance.

3.13 Some of the offences alleged to have been committed by the Applicant included inter alia;- that he ill-treated the small herd boy;

- That he would only let out the cattle from the kraal between 12h00 and 13h00;
- That he became insulting and abusive to people who visited the umphakatsi
- Poor performance resulting to have the cattle impounded by the Mbabane Pound Master coming all the way from Elangeni. The question is where was he when the cattle found its way to Mbabane,
- That, because of his poor work performance and negligence one male beast was knocked down by a car while on the highway between Mbabane and Manzini.

3.14 There was no denial from the Applicant that these misdemeanors occurred before he was finally dismissed. It is common cause that the Applicant and Respondent discussed these developments and that the Applicant was verbally warned several times to improve the manner in

which he was doing his job, however, there was nothing documented.

3.15 In view of the foregoing the arbitrator holds the view that the termination of the Applicant was procedurally unfair. Further, I have also taken into account that employers are permitted to apply discipline to their employees informally, such, however, should not be taken too far to create a kangaroo court.

3.16 I now have to deal with the issue of whether the dismissal of the Applicant was substantively fair. To answer that question the arbitrator is guided by trite law that;-

- First the accused must have committed the offence, he is alleged to have committed.
- Secondly, whether there was a rule in place and that the said rule was unambiguous
- Thirdly, whether the employee was aware of the rule
- Fourthly whether the employee contravened the said rule
- Is the rule or standard reasonable and valid rule or standard;
- The nature of the job, which may be such that the damage or injury of any further infraction makes the risk of continued employment intolerable.
- The gravity of the contravention
- Finally, but not limited to, was the dismissal an appropriate sanction in the circumstances taking into consideration that the courts have taken the view over

the last decade or so that jurisprudence should constitute a guide **“see *Sidumo & Others vs. Rustenburg Platinum Mines LTD & Others; para 67, 181 and 183; Metro Cash & Carry LTD vs. Tshela, para 1133 B-E; Cape Town City Council vs. Maseko & Others at paras 14 and 18”***.

3.17 In the case before us it is common cause that all the Respondent witnesses testified that the relationship between the Applicant was no longer a healthy one. In fact it was already seriously dented beyond repair.

3.18 Further the Applicant failed to rebutt and or deny the allegations leveled against him by the Respondent. Where there was some denial from the Applicant, this was not corroborated by any witness or let alone some evidence.

3.19 In this instance the arbitration is referring to his unbecoming behaviour towards the Respondent on the specific dates of April 2008 when it is alleged that he picked up the pots in the kitchen and attempted to assault the maid in the presence of the Respondent; September 2008 wherein he allegedly woke up that morning and abused the Respondent until he was reported to the Council and in November 2008 when he had refused to collect the cattle until the Respondent herself had to use a car with small boys who assisted her.

3.20 The Applicant’s argument against these allegations was that it was unfortunate that all the witnesses called by the

Respondent could not testify on his behalf for fear of victimization by the Inkhosatana. While this may be so but there was no evidence brought before the arbitration to suggest that there was such fear to the witnesses.

3.21 It is on record that notwithstanding that they were her witnesses; their testimony was valuable in determining whether the Applicant was employed or not and whether he was paid a wage by the Respondent on a monthly basis.

3.22 For a dismissal to be fair in our labour standards it has to meet the standards provided by the provisions of Section 36 of the Employment Act 1980, that there must have been warnings prior to the dismissal. In my view there were sufficient warnings to assist the Applicant to heed his conduct and performance, hence the involvement of the Indvuna and the council of elders.

3.23 Further, that the decision to dismiss should satisfy the provisions of Section 42 (a) of the Employment Act 1980 that taking into consideration all the circumstances of the case dismissal was the only option available for the Respondent. In the circumstances the arbitration is satisfied that the dismissal was substantively fair.

3.24 The Applicant as his claims prayed to the Commission that the Respondent be compelled to pay him the following claims

(a) One month notice of E450.97.

Having come to the conclusion that the termination of the Applicant's services was procedurally unfair, I have come to the conclusion that this claim should succeed.

(b) The next claim by the Applicant is that of the additional notice of 4 days for each year of service after the first year. The Applicant was employed in November 2006, according to him, while the Respondent suggested that it was December 2006. None of the parties gave evidence as to the correct date. However, in terms of the Employment Act 1980 Section 22, the employer is obliged to complete the Second Schedule form 22 which is the "written particulars of the employment form. In the absence of this we are forced to believe the Applicant on the balance of probabilities.

In this regard we shall consider the Applicant's service having begun on or about November 2006. This will suggest that at the time of the termination of his services, the Applicant's service was two years and as such is entitled to 4 days additional notice which is equivalent to **E110.08**

(c) The third claim is that of severance allowance which is calculated at ten (10) days each year after the first year of service. This means that he is entitled to ten (10) days as follows $10 \times 27.52 = \mathbf{E275.20}$. This is in terms of Section 34 of the Employment Act 1980.

(d) The other claim by the Applicant is that of underpayments. The Applicant averred to say that he was paid a monthly wage of E250.00 instead of what the law provided. The said underpayments continued from December 2006 to November 2007 wherein his wage was increased to E450.00 per month. I have checked the applicable Legal Notice for **Domestic Employees** that was in force in 2006. That is **Legal Notice No. 191 of 2005** which was effective from August 2005 to December 2006. The appropriate monthly wage for the position of the herdsman is **E409.97**.

This suggest that the Applicant at this rate was underpaid for two months; being November and December 2006 of the value of **E159.97x2 =E319.94**.

To take if further, the next wages regulation which became effective from 1st January 2007 is **Legal Notice No. 219 of 2006; Wages Act, 1964, (Act NO. 16 of 1964) for the Regulation of Wages (Domestic Employees Order)**. The applicable monthly wage is not less than E450.97 suggesting that the Applicant was short paid the sum of **E200.97** for ten (10) months as he confirmed that his wage was increased in November 2007. This gives a shortfall of E2009.70.

I have further considered the period from December 2007 to the date of dismissal which is November 2008 which amounts to twelve months with a monthly short fall of E0.97 amounting to E11.64 for the entire period. The total underpayments amount to **E2341.28**.

- (e)** The next claim for the Applicant is leave due which was never taken at any stage during the employ of the Applicant. This was not denied by the Respondent. The Applicant is entitled to 12 days with full pay per year and at the time of dismissal he had 24 days due to him which amounts to **24x27.52 = E660.48**.
- (f)** Finally, the last claim submitted by the Applicant is compensation for unfair dismissal. As stated above my view is that the Applicant though his dismissal was procedurally unfair, it was substantively fair. In this regard the testimony of all the witnesses of the Respondent indicated that the Applicant contributed in one way or another to his dismissal. I have further taken into account the length of service rendered by the Applicant to the Respondent and further considered the provisions of **Section 16 subsection 4 of the Industrial Relations Act 2000 as amended**. It is ordered that the Respondent shall pay the Applicant as compensation the amount equivalent to two (2) month's wages E901.94.

4. **THE AWARD**

4.1 Having considered all the facts, evidence and circumstances of the case, the following award is issued. That the Respondent shall pay the Applicant the following:-

4.1	Notice pay of one months wages	= E1 192.28
4.2.	Additional notice	= E 110.08
4.3.	Severance allowance	= E 275.20
4.4.	Underpayments	= E2 341.28
4.5.	Compensation for unfair dismissal of two (2) months wages	= E 901.94
4.6.	Leave due and payable	= E 660.48
	Total due and payable	= <u>E4 739.95</u>

The said amount shall be paid at CMAC by the Respondent not later than the 25th November 2009.

SIGNED AT MBABANE ON THIS.....DAY OF OCTOBER, 2009.

AARON M. DLAMINI
ARBITRATOR