

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

**Held in Manzini CASE NO: SWMZ 284/08**

**In the matter between;**

**BONGIWE MASEKO Applicant**

**AND**

**SAFE FINANCIAL SERVICES Respondent**

**CORAM;**

**ARBITRATOR : THULANI DLAMINI**

**FOR APPLICANT : N. FAKUDZE**

**FOR RESPONDENT : J. HENWOOD**

**ARBITRATION AWARD**

**1. Parties and Hearing**

The Applicant in this matter is Bongiwe Maseko an adult Swazi female and former employee of the Respondent. The Respondent on the other hand is Safe Financial Services a company duly incorporated in terms of the company laws of Swaziland and having capacity to sue and be sued in its own name. The arbitration hearing proceeded at different dates between the January, 2009 and June 2009 when it was finally completed.

**2. BACKGROUND OF DISPUTE AND ISSUES TO BE DECIDED**

The dispute before the Commission relates to the alleged constructive dismissal of the Applicant by the Respondent in May, 2009. It (dispute) was reported to the commission in terms of section 76 of the Industrial Relations Act, 2000 (as Amended) and was referred to conciliation, where, however, the parties failed to reach an amicable settlement of same. As a result of this, a certificate of unresolved dispute was issued and the parties decided to refer the matter to arbitration, hence my appointment to arbitrate herein. I am required to decide whether the Applicant was indeed constructively dismissed or not by the Respondent. The parties agreed that closing submissions (written) were to be submitted by the 30<sup>th</sup> June 2009 but as at the end of September 2009 only the Applicant's representative had submitted his closing submissions. Despite numerous reminders to the Respondent's representative to have his submissions submitted he failed to do so and no reason was forthcoming for such failure hence my decision to make my award without the Respondent's closing submissions.

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**3. SUMMARY OF EVIDENCE APPLICANT'S CASE**

**3.1 TESTIMONY OF BONGIWE MASEKO (Applicant)**

The Applicant stated under oath that she was employed by the Respondent as an Office Clerk in March 2001. Her duties included assisting customers in completing loan application forms and debt collection. She went on to state that around February 2008 she asked her Manager, Zandile Simelane, about clients who had made their payments but were not receipted. Apparently the said Manager did not take kindly to the question and from that date her attitude towards the Applicant changed so much so that she stopped assigning the Applicant any duties and talking to her. The Manager used to send the Applicant to Mbabane to deliver the balance sheets, and that stopped as well. The Applicant was then informed by the Manzini branch Manager that her Manager was accusing her of not doing any work and this surprised the Applicant because as far as she was concerned it was the Manager who was not giving her work to do.

The Applicant stated further that the animosity between her and her Manager disintegrated so much so that the Manager started accusing her of practicing witchcraft. This went on until the Manager on

two incidents allegedly sprinkled a disinfectant to neutralise the Applicant's muti. She testified as well about an incident in which she applied for a staff loan which was approved by the Director, a Mr. Drinkwater, but was to be later turned down by her branch Manager. She then noticed that even the Director was now siding with the branch Manager instead of intervening by diffusing the tension between her and the branch Manager.

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She then wrote a letter directed to the Director explaining the difficulties she was experiencing and how this was affecting her work. In that letter she further asked the Director to pay her terminal benefits accrued as she was resigning and that her last day of work was going to be 31 May 2009. She received no response to that letter. She then wrote another letter on the 13<sup>th</sup> May 2008 in which she clarified that in fact it was not her intention to resign but had only wanted him as the Director to intervene in the situation between her and the Manager. Again she did not receive a response to this letter as well. She then finally decided to make an appointment to see the Director and was in fact able to see him on 29 May 2008 in Mbabane where she related her suffering at the hands of her branch Manager and further requested that he intervenes or atleast transfer her to another branch. To her dismay the Director advised her that he was accepting her resignation and that the company would pay what was due to her.

After the meeting with her Director and as she was travelling back to her work station she received a call from her Manager advising her not to bother reporting back to work for the remaining two days in May and that she would receive her money in her bank account. She accordingly stayed at home as ordered and on pay day she only received her leave pay.

She feels she was constructively dismissed as a result of the conduct of her Manager towards her and the Director's failure to intervene when she requested him to. She now claims;

- a) Notice Pay.
- b) Additional notice pay.

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- c) Severance pay.
- d) Back pay from October 2007 to March 2008.
- e) 12 months compensation for unfair dismissal.

Under cross examination the Applicant confirmed having been employed as an Office Clerk but went on to clarify that initially that is what she was employed to do but she would also do office cleaning and debt collection as well.

She was also asked about an incident where she had stolen money from her employer and she confirmed having done so and that she had actually intended to pay it back but unfortunately her boss discovered the theft before she could do so. According to her evidence she did not steal the money per se since she had always harboured an intention to pay it back and in actual fact she did pay it back after coming to an agreement with Drinkwater on liquidating it in instalments. When asked how much was involved she mentioned that it was about E14,200.00 or thereabout.

Henwood, on behalf of the Respondent, further probed the Applicant on the disinfectant issue, wondering what was wrong with the Manager using a Jeye's fluid disinfectant to kill ants. And the Applicant's response was that she should have used 'Bluedeath' powder which is specifically meant for getting rid of pests instead of the disinfectant which is known as a muti neutraliser.

Henwood then referred the Applicant to her letter of the 14<sup>th</sup> April and wanted to know what issues were raised in it and her response was that she was bringing to the attention of the Director the manner she

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was being treated by the Manager. Hereunder is how the cross-examination proceeded on that

aspect;

Henwood: Read the first letter into the record.

Applicant: (Reads letter).

Henwood: What is this letter, is it a letter of resignation or complaint?

Applicant: I was complaining about the manner I was being treated, I was in pain that is why I said I wanted to leave.

Henwood: You planned to leave on the 31<sup>st</sup> May 2008?

Applicant: No I did not want to leave I thought Mr Drinkwater would then intervene and call us together to reconcile us-I was under pressure that is why I even wrote the second letter.

Henwood: I put it to you that you resigned.

Applicant: No I did not resign that is why I wrote the second letter with the intention of cancelling the first one.

It was put to the Applicant that the reason she was not paid her benefits was because she had resigned, and she disputed that she had resigned and stated instead that as far as she was concerned she had withdrawn her resignation. She also maintained the issue of being underpaid stating that this was according to the government gazette. And under re-examination she still maintained that over and above doing clerical work she also did debt collection.

That was the Applicant's case.

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## **RESPONDENT'S CASE**

### **3.1 TESTIMONY OF LEAN DRINKWATER**

First to testify in support of the Respondent's case was its Director Lean Drinkwater. He stated under oath that he is not personally involved in the day to day running of the business, instead he employed some people to do just that. He went on to mention that the business has three branches and mentioned these as Mbabane, Manzini and Matsapha. According to this witness the Applicant was initially employed and based in the Manzini branch as an Office Clerk. Her duties were to assist customers in completing loan application forms and general administrative office work. Sometimes she would go with owing clients to the bank to withdraw money owed to the company.

Drinkwater further stated that the Applicant had problems with her Manager in the Manzini branch as a result of which, after failing to resolve same, he then decided that the Applicant be transferred to the Matsapha branch. Whilst working in Matsapha it was discovered that there was some money missing and upon investigation the Applicant was confronted and she admitted to having stolen the money. She however undertook to repay the money and settlement terms were negotiated and agreed upon.

It was this witness' further testimony that like in the Manzini branch, the Applicant then developed an unhealthy working relationship with her Manager there. Whilst still trying to comprehend the new problems he then received a letter of resignation from the Applicant. Upon

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receipt of the letter of resignation he accepted the fact that the Applicant was resigning from her position and hoping that at least the problems would 'go away'-so to say. It was Drinkwater's testimony that the Applicant was the problem in that she was not a team player. He vehemently disputed that the Applicant was a debt collector. He confirmed having met the Applicant in Mbabane on the 29<sup>th</sup> May 2008 where he informed her that there was nothing to discuss since she had resigned and was left with only two days to complete her notice period.

Under cross examination by Fakudze on behalf of the Applicant this witness maintained that the Applicant was employed as an Office Clerk. When asked why he did not intervene after the report by the Matsapha Manager of the 'bad blood' between the two he stated that he had wanted the Manager and the Applicant to resolve the problem themselves before deciding to intervene when they had

failed. He vehemently disputed the allegation that he had failed in his duties as Director by not intervening.

When asked if he had received the second letter written by the Applicant he confirmed that he did and further that he did not do anything about it because he had accepted her resignation and that at the time she was left with only two weeks to serve as notice.

### **3.2 TESTIMONY OF ZANDILE SIMELANE**

This witness testified under oath that she is an employee of the Respondent and based at the Matsapha branch as a Manager. She further confirmed knowing the Applicant stating that she was her

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subordinate and employed as an Office Assistant. She vehemently denied ill-treating the Applicant, not assigning her work to do and bad mouthing her to her colleagues. Instead, so she stated, it was the Applicant who had told her that she (Applicant) would not take orders from her but the Director-Drinkwater. The Applicant would come to work and sit on her desk without doing any work.

Relating about the disinfectant she stated that she had only wanted to kill ants that were a menace in her office and that nobody amongst the staff members complained except the Applicant. She denied that she was frustrating the Applicant in her work and stated instead that it was the Applicant who was difficult to work with. Henwood enquired as to how the relationship between this witness and the Applicant disintegrated and this witness stated that the Director had discovered between the years 2006/7 that she (Manager) had made some blunders in her work as a result of which some money was short. The Director made the Manager pay for her mistakes. And when the Applicant learnt about the incident she was of the view that the Manager should have been dismissed. That is when her attitude towards her Manager changed, such that she ended up informing her that she would not take orders from her.

Asked if she personally had a problem with the Applicant, she answered in the negative. And to prove that she did not she related the incident when the Applicant stole her employer's money and she (Manager) asked the Director to allow the Applicant to repay the money she stole instead of disciplining her.

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Under cross questioning by Fakudze this witness stated that the Applicant did all the duties that were done by her male colleagues. When asked why she at first did not report the change of attitude by the Applicant her response was that she first wanted to deal with it herself before reporting to the Director. She mentioned as well that she even roped in the Manager of the Manzini branch but the Applicant informed this Manager that she was leaving the company at the end of May 2008 to further her studies. She maintained that the Applicant refused to take instructions from her. She disputed that she used the disinfectant to cleanse her office but rather to kill ants.

That was the Respondent's case.

### **4. ANALYSIS OF EVIDENCE AND ARGUMENTS**

As pointed out earlier on, the Respondents representative failed to submit his written closing submissions herein hence my decision to go ahead and issue my award without the Respondent's submissions.

In its closing submissions and arguments the Applicant's representative maintained that the conduct of the employer was unfair and unlawful. The conduct complained hereof was that of the Manager and Director. It was submitted that the conduct of the Applicant's immediate supervisor, the Manager, changed towards the Applicant and she started to mistreat and be hostile to the Applicant. In essence, the Applicant's representative re-iterated the Applicant's testimony.

Fakudze further submitted that case law authorities have emphasised on numerous occasions that

the present Applicant has discharged the

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onus of proving that the conditions at her work place were unfavourable and not making it easy for her to continue executing her duties. I was then referred to the case of Mfanimpela Vilakazi v Anti Corruption Commission and others IC Case no. 232/2002, and this case was quoted in relation to the principle of the onus being on the employee and the objective standard used in such cases. The argument by Fakudze herein was that the conduct of both the Manager and Director was unlawful and unfair and was further responsible for the resignation of the Applicant.

A further submission by Fakudze was to the effect that the Applicant exhausted internal remedies before resorting to resigning. She apparently tried to talk to the Manager, to no avail. She then wrote to the Director and complained about the unfair treatment she was receiving from the Manager and further mentioned that she would have to stop work if no resolution is made on her complaints. I was then referred to the case of Jameson Thwala v Neopac (Swaziland) Limited IC case no. 18/1998 in support of the argument that the Applicant had taken all possible steps to try and solve the situation.

In support of the argument that dismissal occurs immediately the conduct of the employer towards the employee is unfavourable and unlawful, Fakudze referred me to the case of Timothy Makhathu v JD Group of Companies IC Case No 85/1997.

Fakudze further submitted that the evidence of the Respondent about the theft of money by the Applicant is irrelevant and that it does not advance the case of the Respondent.

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The law of constructive dismissal is succinctly set out in the following judgement by the Labour Appeal Court in Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC);

"In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasised that a 'constructive dismissal' is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the employer. As Lord Denning said in Woods v WM Car Services (Peterborough) Ltd (1982) IRLR 413 (CA) at 415: The circumstances [of constructive dismissal] are so infinitely various that there can be, and is, no rule of law saying that circumstances justify and what do not. It is a question of fact for the tribunal of fact..."

Subject to the reservation that in our labour law it is not necessary to find an implied term of the kind required in English law, an approach that comments itself to me is that of the Employment Appeal Tribunal in Woods v WM Car Services...: [I]t is clearly established that there is implied in a contract of employment that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's

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conduct as a whole and determine whether it is such that its effects, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it...the conduct of the parties has to be looked at as a whole and its cumulative impact assessed."

In Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 (LAC) the Labour Appeal Court went on to say the following (at 724 D-F), after quoting approvingly from Jooste v Transnet supra:

"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee can not

fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned. Where she proves the creation of an unbearable work environment she is entitled to say that by so doing the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end..."

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It can therefore be confirmed that in cases of constructive dismissal the inquiry is whether or no the employer conducted itself in a manner that destroyed the relationship between the parties. What is also required is some form of culpability on the part of the employer although it is not required that the employer must necessarily have intended to get rid of the employee.

The cases mentioned above basically establish that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry then becomes whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

Still on that score one should emphasise that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. More indeed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get

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rid of the employee, though in many instances of constructive dismissal that is the case. Authors D. Du Toit & Others in their work Labour Relations Law, A Comprehensive Guide, 3<sup>rd</sup> edition at page 343 express that;

"The question is whether taking all the circumstances into account there was objective unfairness which drove the employee to believe that there was no way out but to walk away."

Coming to the present case, the contention of the Applicant is that it was the conduct of the Manager and the Director that made her working conditions intolerable and as such she opted to quit her job. Against the Manager she stated that she started mistreating and being hostile towards her. And against the Director she said that he started discriminating her in that she was denied a loan.

However, upon consideration of all the facts in the present case I am not persuaded that the Applicant was indirectly forced to resign from her employment. In her resignation letter she starts off by informing the Director that she no longer has a healthy working relationship with the Manager. Thereafter she informs the Director of her decision to quit her job so that she can be able to go back to school. Clearly she had already made her choice about resigning so she could go back to school. In her resignation letter she was not requesting the Director to intervene but was rather advising him that as at the end of May 2008 she was stopping rendering her services to the company, which the Director accepted. Her subsequent letters to the Director in which she seeks to withdraw her resignation are of no significance without the

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consent of the Director especially since he had accepted the resignation.

It has been stated that "mere unreasonableness or illegitimate demands by the employer, do not amount to constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship." (See: Alderdorff v Oustpan International 18 ILJ 810 CCMA). It was further held in this same case that an employee who chose to resign rather than seeking to resolve matters informally or by making use of company grievance procedure can not be said to have been constructively dismissed.

I accordingly find that the Respondent can not be said to be culpably responsible for the resignation of the Applicant. Her resignation can not therefore be said to be in terms of section 37 of the Employment Act, but rather was to go back to school. I also fail to comprehend how she claims to have been a debt collector when her contract of employment clearly spells out that she was employed as an Office Clerk.

#### **5. AWARD**

I accordingly dismiss the case of the Applicant in its entirety.

DATED AT MANZINI ON THIS 31<sup>th</sup> DAY OF OCTOBER, 2009.

THULANI DLAMINI

CMAC COMMISSIONER