

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI STK 034/08

In the matter between:-

MATHEMBA DLAMINI APPLICANT

And

C.M.C DI RAVENNA SWAZILAND RESPONDENT

CORAM:

ARBITRATOR : ROBERT S. MHLANGA
FOR THE APPLICANT : MR Z. MKHATJWA
FOR THE RESPONDENT : MR L- MDZINISO

ARBITRATION AWARD

VENUE: CMAC OFFICES, ENGULENI BUILDING, GROUND FLOOR, MANZINI

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1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The applicant is Mathemba Dlamini, who was duly represented herein by Mr. Z. Mkhwatjwa.
2.2 The respondent is C.M.C Di Ravenna Swaziland, which was duly represented by Mr L. Mdziniso.

2. BACKGROUND OF THE DISPUTE

- 1.1 The applicant, Mathemba Dlamini reported a dispute of unfair dismissal to the commission (CMAC), following his retrenchment by his former employer, C.M.C Di Ravenna Swaziland, hereinafter referred to as the respondent.
2.2 The dispute was eventually conciliated upon by the commission, but the dispute was not resolved as the parties failed to reach a consensus herein. A certificate of unresolved dispute was issued by the commission. Subsequently, the dispute was by agreement referred to arbitration for determination hereof.

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3.3 The arbitration hearing was preceded by a pre-arbitration meeting held on the 6th October 2008 at CMAC Offices at Siteki. The parties requested that the arbitration should be held in Manzini because this venue is convenient to both parties. As per the parties' request the matter was subsequently deferred to 7th November 2008, at 9:00 AM, at CMAC offices, Enguleni Building, Ground Floor, for continuation of the arbitration hearing.

3- ISSUE TO BE DECIDED

In a nutshell, the question which falls for determination herein is whether or not the applicant's dismissal or termination of services was fair and justified in terms of Section 36 of the Employment Act of 1980 (as amended).

4. SUMMARY EVIDENCE 4.1 APPLICANT'S CASE

4.1.1 The applicant, Mathemba Dlamini reported a dispute of unfair dismissal to the commission (CMAC), following his retrenchment by his former

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employer, C.M.C Di Ravenna Swaziland, hereinafter referred to as the respondent.

4.1.2 The applicant, Mathemba Dlamini gave his evidence under oath in support of his case. I will refer to this witness as the applicant, AW1 and or Mr Dlamini as the case may be.

4.1.3 The applicant said that his services were terminated on the 27th February 2008. The termination of his contract of employment or services was communicated to him in writing. The applicant referred the arbitrator to the letter of termination of contract dated 27th February 2008, and same was marked as annexure "MD1" and it was accordingly admitted as part of the applicant's evidence.

4.1.4 The applicant testified that by the aforesaid letter the respondent notified him that his contract of employment with C.M.C Di Ravenna Swaziland had come to an end due to the fact that the job the applicant was employed to do was reduced or finished.

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4.1.5 Mr Dlamini stated in his testimony that following his dismissal, he then lodged an appeal to the project manager against the respondent's decision of terminating his services. He referred the arbitrator to the letter of appeal, dated 5th March 2008.. The letter was admitted at the applicant's request, to be part of his evidence and it is marked as annexure "MD2". The applicant said that the respondent did not entertain his appeal and as such the respondent's decision to terminate his contract remained unchanged.

4.1.6 The applicant said that subsequently he reported a dispute of unfair dismissal against the respondent to CMAC. It is the applicant's testimony that his services were unfairly terminated, because the work or job in his department was neither reduced nor finished (emphasis added). The applicant stated that in his department two (2) more welders were employed after he had left the respondent's employ. He said that he was specifically replaced by one, Moses Nsimbini. The applicant claimed that Moses Nsimbini worked under his supervision and that he trained him to be a welder.

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4.1.7 The applicant further alleged that at the time of his dismissal his position was not redundant or abolished; and hence his retrenchment was substantively unfair (my emphasis).

4.1.8 The applicant testified that no consultation between him and the respondent took place prior to the termination of his services or retrenchment, and consequently his dismissal was procedurally unfair (emphasis added).

4.1.9 Mr Dlamini stated that at the workplace he was chosen by the workers to be their representative. The applicant alleged that he was the chairman of the workers committee. He claimed that he was active in his pursuit of the improvement of the working conditions of his fellow workmates, Mr Dlamini said that he viewed his unfair retrenchment as victimization by the respondent for the active role he played in championing the rights and interests of the workers.

4.1.10 Mr Dlamini confirmed the fact that at the time of his retrenchment, the respondent paid him the terminal benefits which reflects on his last salary

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advice slip; a copy of same is filed of record and it is marked as annexure "MD4".

Cross Examination

4.1.11 Under cross examination the applicant testified that he is aware that the respondent is a construction company.

4.1.12 The applicant also said that he was the only one who was dismissed by the respondent under the guise of retrenchment in his department.

4.1.13 The applicant also reiterated the fact that after he had left the respondent's employ, the respondent employed or recruited other people.

4.1.14 Mr Dlamini testified under cross examination that there were employees who were retrenched by the respondent from other departments or sections at the workplace.

4.1.15 It was put to the applicant that his services were lawfully terminated in terms of clause 2 of the contract of employment between him and the

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respondent. But however, the applicant disputed this and he maintained that he was unfairly dismissed by the respondent.

4.1.16 It was further put to the applicant that no one was employed by the respondent, after he has left the respondent's employ, to replace him. Again the applicant disputed this allegations; he maintained that he was replaced by Moses Nsimbini (AW2).

4.1.17 The respondent further put it to the applicant that the reason why he was retrenched was because of the fact that in his department the job or work was reduced. The applicant again vehemently denied these allegations. He (applicant) maintained the fact that in his department or section he was the only one who was dismissed or retrenched.

Moses Nsimbini's testimony

4.1.18 He applicant also led the evidence of one Moses Nsimbini, hereinafter referred to as AW2.

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4.1.19 Moses Nsimbini duly sworn, testified that he was employed by the respondent company in or about October 2006 as a General Labourer. He said that in due course he was promoted to the position of Store Clerk in the company.

4.1.20 AW2 further testified that he was based at the crushing plant section, wherein he worked until February 2008. He said that in the crushing plant department or section, he was a time keeper.

4.1.21 It was AW2's testimony that while he was still in this department, he was working alongside Mathemba Dlamini (applicant). Moses Nsimbini further stated that Mathemba Dlamini was working both as a welder and Switchboard Crusher operator. He said at times he relieved the applicant of his duties as a Switchboard crusher operator (which means he sometimes worked as a Switchboard crusher operator).

4.1.22 AW2 however admitted that he was not a welder. In short, his duties did not involve welding. This witness testified that the applicant's position was never abolished.

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4.1.23 Mr Nsimbini testified that following the applicant's retrenchment, the applicant's job was assumed by him, wherein he worked as a Switchboard crusher operator with effect from 27th February to December 2008. He stated that the crushing plant division was closed down in December 2008. AW2 said that he was promoted to be a Switchboard crusher operator. He said that subsequent to that his salary was increased to be commensurate with his new position (emphasis added).

4.1.24 AW2 alleged that Mathemba Dlamini (applicant) was the workers' Representative at the workplace. He said that the applicant was a Shop Steward. Mr Nsimbini stated that the applicant and respondent's relationship was not good, and that this resulted from the fact that the applicant was

the workers mouthpiece.

4.1.25 AW2 stated that he was no longer employed by the respondent. His services were terminated in December 2008, following the closing down of his department namely, crushing plant division.

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Cross examination

4.1.26 During cross examination the witness was asked as to who authorised him to do the applicant's job. AW2 stated that he was authorised by the Foreman.

4.1.27 Under cross examination AW2 testified that his promotion to the position of Switchboard crusher operator was never reduced into writing; but it was verbal. However the respondent disputed that AW2 was promoted as alleged by him.

4.1.28 AW2 also testified under cross examination that his department was closed down due to the fact that there was no more work. He said that all the workers in that department were retrenched.

4.1.29 The respondent disputed the fact that the relationship between the applicant's committee and the respondent was bad. On the other hand AW2 maintained that the relationship between the said parties was not good.

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4.2 Respondent's case

4.2.1 The respondent led the evidence of one witness namely, Nomcebo Shongwe, in support of its case. I will refer to this witness as either RW1 or Ms Shongwe as the case may be.

4.2.2 Nomcebo Shongwe testified under oath that she is currently employed by the respondent as the Human Resources Manager. She said that she joined the respondent company in or about September 2006, and that she was initially employed as a clerk.

4.2.3 Ms Shongwe stated that she knows the applicant. She said that the applicant is the respondent's former employee.

4.2.4 She testified that the applicant was employed by the respondent on the 1st September 2006 on a fixed-term contract. She said that his services were lawfully terminated on the 27th February 2008 as per clause 2 of the written fixed-term contact. Ms Shongwe stated that the work or job for which the applicant was

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employed was reduced, and hence the applicant's retrenchment (emphasis added). The arbitrator was referred to the contract of employment between the parties, a copy of which is filed of record.

4.2.5 On the other hand, Ms Shongwe testified that the main project for which the respondent company was hired by SWADE to do namely, the construction of the LUSIP: Feeder Canal at Siphofaneni area was completed.

4.2.6 RW1 referred the arbitrator to a letter dated 31st March 2008 and another dated 14th April 2008, in support of her testimony that the project the respondent was engaged in was completed.

4.2.7 Ms Shongwe testified that after the applicant's retrenchment, no one was hired by the respondent to replace him (applicant). She disputed the fact that the applicant's job was still available at the time of the applicant's retrenchment.

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4.2.8 RW1 said that the applicant was not the only employee who was retrenched by the respondent during this period, as employees were retrenched dating from January 2008 to date.

4.2.9 RW1 admitted the fact that the applicant was the workers' representative at the workplace. However, she denied the allegations that the relationship between the respondent and the applicant was sour or bad.

4.2.10 Ms Shongwe also denied AW2's allegations that he replaced the applicant and that he (AW2) was promoted to be a switchboard crusher operator.

Cross Examination

4.2.11 Ms Shongwe testified under cross examination that the applicant was not permanently employed by the respondent.

4.2.12 It was put to RW1 that the applicant's job or work was not reduced nor finished at the time

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of his retrenchment (emphasis added). This witness maintained that the applicant's job was finished, hence his retrenchment.

4.2.13 RW1 disputed the fact that after the applicant's retrenchment, AW2 took over the work previously done by the applicant. She said that AW2 was not a welder in the first place, so he could not do the applicant's job, even if it was still available (emphasis added).

5 Analysis of evidence and arguments

5.1 Both parties filed their closing submissions in support of their respective cases.

5.2 Briefly, the applicant's case as articulated in his closing submissions is as follows:

5.2.1 The applicant argues that at the time of the termination of his contract of employment, he was an employee to whom Section 35 of the Employment Act 1980 (as amended) applied.

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5.2.2 It is submitted on behalf of the applicant that his dismissal was automatically unfair both in substance and procedure (my emphasis).

5.2.3 It is further argued herein by the applicant that the purported retrenchment was not bonafide in that it was motivated by the applicant's active role in the Workers Committee (my emphasis added).

5.2.4 It is the applicant's submission that his retrenchment was not bona fide because he was never consulted nor was he given notice of the intended or contemplated retrenchment by the respondent prior to such retrenchment. In short, the applicant argues that the purported retrenchment was not in compliance with the provisions of the law pertaining to retrenchment (my emphasis added). In this regard reference was made to the following decided cases namely; Lonhlanhla Masuku vs KK Investments (Pty) Ltd IC case no. 341/03, Kenneth Ngcamphalala v Swaziland Development and Savings Bank (IC case no.26/2003) at pages 5 to 7; Thabo

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Simelane V JD Group Swaziland (pty) Ltd (IC case no. 166/02); Food and Allied Workers Union & Others V Ameens Food Products & Butchery (1988) 9 ILJ 659 at 668.

5.2.5 The applicant submits that his dismissal was procedurally unfair in that the respondent failed to follow the laid down procedures pertaining to retrenchment, which would have afforded him with an opportunity to consult on measures to avert or minimise the adverse effects of the retrenchment.

5.2.6 The applicant also claims that his dismissal was substantively unfair because the reason for the termination of his services was not permitted by Section 36 of the Employment Act 1980 (as amended).

5.2.7 In conclusion the applicant prays for an award to be issued in his favour directing the respondent to pay him wages for 10 months amounting to E20 494.50 plus a sum of E49 186.80, being in respect of compensation for

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automatically unfair dismissal equivalent to 24 months. The total sum claimed herein is E69 681.30.

5.3 On the contrary, the respondent submits as follows:

5.3.1 It is the respondent's submission that the applicant, Mathemba Dlamini entered into a written fixed-term contract with the respondent on the 1st September 2006. In terms of clause 2 of the said contract of Employment, the applicant was engaged as a weeder from the 1st September 2006 up until such time that the project or specified task and or activity associated or involved in the phase or job for which he was employed was reduced or finished whichever occurred first.

5.3.2 It is the respondent's argument that, regard being had to the aforesaid fixed-term contract entered into between the parties, the termination of the applicant's services was legally justified because the task assigned to him namely, that of being a welder was finished (my emphasis added). The respondent submits

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that the applicant was never employed on a permanent basis and that he was never unfairly terminated.

5.3.3 On the other hand the respondent argues that the applicant is not an employee to whom Section 35 of the Employment Act 1980 applied, due to the fact that he was engaged on a fixed-term contract, and the said contract had expired, and as such he could not claim to have been unfairly dismissed (my emphasis).

5.3.4 It is also the respondent's argument that the applicant was never replaced by Moses Nsimbini (AW2) following the said retrenchment. The respondent submits that AW2's evidence that he assumed the applicant's duties should be rejected, because AW2 was a store clerk/time keeper. It is said that AW2 in his testimony admitted this fact during cross examination.

5.3.5 Finally the respondent submits that the applicant's fixed-term contract contained a suspensive clause. The respondent argues that the applicant's task of being a welder got

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finished and hence the respondent could not assign him a new task as the project was almost to its completion. It is argued that there were other employees from other departments who were also retrenched.

5.3.6 In conclusion the respondent submits that the applicant's claims must be dismissed.

5.4 Having analysed all the evidence adduced herein, together with the parties' closing arguments, I have come to the following conclusion:

5.4.1 It is my considered view that the applicant, at the time of the termination of his contract of employment, was not an employee to whom Section 35 of the Employment Act 1980 (as amended) applied. In this regard, I accept the respondent's submission that, the applicant was employed on a fixed-term contract by the respondent on the 1st September 2006. In terms of this contract its duration was going to be determined by the reduction or completion of the specific task or job specifically assigned

to the applicant and or the completion of the main project whichever occurred first.

5.4.2 Clause 2 of the said contract reads thus: "The period of employment will be from 1st September 2006, up until the completion of the project/specified task/activity associated or involve in the phase/job of which you are employed in, is reduced or finished whichever comes earlier."

5.4.3 Again, may I refer to the case of Magalela Ngwenya v National Agricultural Marketing Board (IC case no 59/2002), at page 4, wherein the Industrial Court was also dealing with the issue of a fixed-term contract had this to say, "In terms of this section therefore an employee who is engaged for a fixed-term, and that term has expired cannot argue that he has been unfairly terminated."

5.4.4 In my view the relationship between the parties was regulated by the contract the parties entered into on the 1st September 2006. Therefore I should give effect to the terms and

conditions of this contract and no other factors should be incorporated into this agreement. This approach was also adopted in the case of Malandoh v S.A Broadcasting corporation Corporation (1994) 18 IU 544 (LC), and this case is cited in the Magalela Ngwenya's case. In the Malandoh's case per Mlambo AJ said: "In my view the relationship between the parties was regulated by this contract and I am of the view that I should give effect to such contract. I am loathe to incorporate other factors in the parties agreement as by so doing I would be imposing a different contract to that which the parties entered into".

5.4.5 On the subject of fixed-term contract, Grogan John, Workplace Law, Eighth Edition, at page 4.4, states that, "the life of a contract may be determined either by stipulating a date of termination, or by stipulating a particular event the occurrence of which will terminate the contract, or with reference to completion of a particular task. Where the parties have indicated that the contract will terminate on the occurrence of a particular event or the

completion of a particular task, the onus rests on the employer to prove that the event has occurred or the task was in fact completed."

5.4.6 In the present case, the issue which falls for determination is whether or not the specified task namely, the job for which the applicant was employed was reduced or finished; because in terms of their contract that is the event on the occurrence of which would entitle the employer (respondent) to terminate the contract of employment entered into between the parties (as per clause 2 of the contract). In its quest to discharge the onus placed on it, the respondent stated, in the form of RW1's testimony that the job for which the applicant was employed namely, welding was finished. In the alternative it is argued that the main project was on the verge of completion. As a result the respondent embarked on retrenchment exercise. It is said that the respondent started retrenching its employees since January 2008. Filed of record are copies of the list of employees earmarked for retrenchment.

5.4.7 On the other hand, the applicant disputes that his job was finished. It is argued that his job was taken by AW2, Moses Nsimbini. AW2 also testified to that fact. Having looked at the evidence on this issue, I am inclined to agree with the respondent that the applicant's job was finished. I reject the applicant's evidence that his job was taken by AW2. Applicant relies on AW2's evidence in support of this contention herein. AW2's evidence cannot be relied upon due to the fact that AW2 contradicted himself in that under cross examination he admitted that he was not a welder and therefore it could not be said that he performed the applicant's job, namely, welding after the applicant had been retrenched. So AW2's testimony is rejected and thus the applicant's point could not be sustained.

5.4.8 On the other hand, the respondent has been able to show that the applicant's contract of employment was lawfully terminated. There is also evidence that the applicant was not the only one

affected by the retrenchment. Filed of record are copies of the list of employees who

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entered into between the parties on the 1st September 2006.

5.4.10 It is my considered view that if the parties intended that consultation should be held prior to the termination of the contract; they would have included that in the said contract.

5.4.11 On the other hand, it is my finding that the applicant's claim was ill-founded and as such it ought to be dismissed. I have taken into account the fact that the respondent gave the applicant short notice, but that was rectified by the respondent in that it paid the applicant in lieu of notice.

6 Award

6.1 Pursuant to my foregoing analysis and conclusion, I now make the following award:

6.2 That the respondent has discharged the onus of proving that the applicant's services were lawfully and fairly terminated.

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6.3 That the applicant's case is hereby dismissed

6.4 Consequently, the respondent is not liable to pay the applicant the claims set out in paragraph 6.3 of the report of dispute.

DATED AT MANZINI ON THIS 9th..... DAY OF APRIL

2009.

Robert S. Mhlanga (CMAC ARBITRATOR)

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