

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini SWMZ 138/08

In the matter between;

PHINDILE MOTSA Applicant

AND

SIYABONGA WINE AND MALT Respondent

CORAM;

ARBITRATOR : THULANI DLAMINI

FOR APPLICANT : HERSELF

FOR RESPONDENT : NO APPEARANCE

ARBITRATION AWARD-(EXPARTE)

1. PARTIES AND HEARING

The Applicant in this matter is Phindile Motsa a Swazi female adult and former employee of the Respondent. The Respondent on the other hand is Siyabonga Wine and Malt a company duly incorporated in terms of the Swazi laws, operating as such in Manzini and having capacity to sue and be sued in its own name.

2. BACKGROUND OF DISPUTE AND ISSUES TO BE DECIDED

The dispute before the Commission relates to the alleged unfair termination of the Applicant's services by the Respondent in March 2008. The Applicant then reported a dispute to the commission in terms of section 76 of the Industrial Relations Act, 2000 (as Amended) and same 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 dismissal of the Applicant by the Respondent was procedurally and substantively fair or not.

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The parties were invited to a pre-arbitration hearing set for the 09th October 2008 at CMAC offices, SNAT Building, in Manzini. Both parties were present on the day, however the Respondent's representative, Cebile Maseko, applied that the matter be rescheduled to another date. The matter was accordingly rescheduled to the 19th December 2009. However on the 19th December the matter could not proceed and it was accordingly rescheduled to the 09th March 2009 for hearing. Invitations were duly sent out to both parties and the Respondent, through its representative, Sentombi Ndzinisa, received the invitation on behalf of the Respondent and signed for it. When the matter came up for arbitration on the 09th March 2009 only the Applicant was present and there was no reasonable explanation why the Respondent was not present. The Applicant moved an application that the matter proceeds without the Respondent since there was enough proof that the Respondent had been properly served with the invitation. I allowed the application for the matter to proceed since the return of service before me indicated that the Respondent had been properly served.

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3. SUMMARY OF EVIDENCE APPLICANT'S CASE

3.1 TESTIMONY OF PHINDILE DORIS MOTSA (APPLICANT)

The Applicant stated under oath that she was employed by the Respondent as a bar-lady in July 2004. She worked for the Respondent continuously until March 28 2008 when she was allegedly unfairly dismissed by the Respondent. At the time of her dismissal her monthly salary was the sum of

E 800.00.

The Applicant summarised the circumstances leading to her dismissal as follows; The Respondent did not pay electricity for the premises the business was occupying for the whole of the year 2007, so that as at November 2007 the electricity bill stood at E 24,000.00 (twent four thousand emalangeni). As a result the Electricity supplier disconnected the electricity supply. The Respondent then paid some money towards the liquidation of the debt and the supply was reconnected. Again in February 2008 the supplier again disconnected the electricity and this time around the bill stood at around E 13,000.00 (thirteen thousand emalangeni). The Respondent paid the amount due and the supply was again reactivated.

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Then the owner of the business, Sandile Hlophe, called a staff meeting after the second reconnection where he stated that he had information that the Applicant had purchased some furniture from one of the furniture shops in Manzini in December 2007, and he wanted to know where I got the money to buy the furniture. The Applicant, seeking clarity, asked her boss as to who his informant was and what the alleged furniture was. Instead of responding to the Applicant's questions the Director of the Respondent suspended her saying she was being disrespectful by posing questions to him as 'boss'. She was suspended for two weeks.

When she completed her two weeks suspension she returned to work to resume her duties. But upon her return the Director terminated her services alleging that the business could not afford to keep her because of a 'down turn' in sales and profits. She feels the termination of her services was procedurally and substantively unfair and claims the following;

- a) Notice pay
- b) Unlawful deductions in February and March 2008 (E 500.00)
- c) 12 Months compensation for unfair dismissal

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That was the Applicant's case.

3. RESPONDENT'S CASE

As mentioned earlier there was no appearance for and on behalf of the Respondent despite sufficient proof of service of the invitation to the arbitration hearing. As such the matter proceeded in the absence of the Respondent's representative following an application by the Applicant.

4. ANALYSIS OF EVIDENCE AND ARGUMENTS

The real issue to be decided here is whether or not the dismissal of the Applicant in this matter was both procedurally and substantively unfair. In this regard consideration will be given to her (Applicant) submission and the evidence presented as a whole. The undisputed evidence before me is that the Applicant's services were simply terminated at the Director's whim without any reason or justification in terms of the labour laws of the country.

The question which remains to be answered in relation to this case therefore is whether it can be said or shown that in terminating the services of the Applicant the Respondent

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satisfied the requirements of section 42 (2) of the Employment Act. Section 42 (2) provides;

"The services of an employee shall not be considered as having been fairly terminated unless the employer proves:

- a) That the reason for the termination was one permitted by section 36; and
- b) That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee".

It is trite law that in order for the dismissal of an employee to be deemed fair there must exist fair and valid reasons for terminating him/her. The requirements of procedural and substantive fairness are that the employer must follow a fair procedure in arriving at the decision of terminating an employee's services. It therefore goes without saying that disciplinary proceedings ought to be conducted in a neutral, fair and impartial environment and manner for whatever misconduct alluded to an employee. The widely accepted elements of a fair procedure include the following;

- i) Investigation of the matter to establish the facts.

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- ii) Prior notice to the employee of the precise charges that he/she is to face at the hearing.
- iii) Prior notice to the employee of his/her right to be represented, normally by a co-worker or union official.
- iv) An impartial presiding officer,
- v) Ample time and opportunity to be given to the employee to present his/her case in rebuttal of the charge(s) he/she is facing, which right includes calling his witness in support of his case examines witness.
- vi) The employee must be present at the hearing and everything must be done to enable him to understand the proceedings.
- vii) The employee must be notified in writing of the employer's decision.
- viii) The employer must provide the employee with reasons why dismissal was seen as the most appropriate sanction, and that there may be a right to appeal.

Substantive fairness on the other hand relates to the reason for the dismissal, for instance theft. There must be fair reason for the termination of an employee's services. The law here seeks to protect employees from arbitrary

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termination of their services at the employer's whim. And after having carefully considered and evaluated the only evidence I have before me, i.e. that of the Applicant, I have come to the considered view that her dismissal was both procedurally and substantively unfair. One needs to point out that the law does not bestow on employees a right not to be dismissed, instead that not to be unfairly dismissed. Every employer is saddled with the responsibility to ensure that when the employee is dismissed, such dismissal is in line with dictates of our labour laws and of course natural justice. Failure to adhere to same will render such dismissals which do not conform to such standard unfair.

It is therefore my well considered view that in this case the inherent probabilities support the Applicant's assertions that her dismissal was both substantively and procedurally unfair. In casu there was no reason advanced by the employer for the dismissal of the Applicant except that there was a 'down turn' in business. Even then the law requires that the parties should engage each other to explore means of how best to tackle such situations and not arbitrary terminations. I therefore find that the dismissal of the Applicant by the Respondent was both procedurally and substantively unfair for which she ought to be compensated.

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5. CONCLUSION

Our law of dismissal is governed by section 42 of the Employment Act 1980, as amended, read in conjunction with section 36 of the same Act. In terms of section 42 (2) of the said Act, the onus to prove that an employee was fairly terminated rests with the employer, and it does not only end there but such termination has to be one permitted by section 36 of the same Act. It is therefore my well considered view that in this case the inherent probabilities support the Applicant's assertion that the termination of her services by the Respondent was procedurally and substantively unfair and as such her claims against the Respondent must succeed.

6. AWARD

The Applicant herein claims a) Notice pay b) unlawful deductions and c) maximum compensation for unfair dismissal. And in arriving at what I consider to be appropriate compensation in this case I have considered the following;

- i) that the Applicant is a single mother with 3 children who are all school attending, and

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- ii) that she stayed without a job for seven months before landing herself another one.

I accordingly award the Applicant as follows;

a) Notice Pay	E 800.00
b) Unlawful deductions	E 500.00
c) 10 months compensation for unfair dismissal	E 8,000.00
Total	<u>E 9,300.00</u>

Payment of the amount aforesaid should be made forthwith. I make no order as to costs. That is the award I make in this matter.

DATED AT MANZINI ON THIS 20th DAY OF MAY, 2009.

THULANI DLAMINI

CMAC COMMISSIONER

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